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No. 06-1142

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, WARDEN, *Petitioner*,

v.

JACKSON CHAMBERS DANIELS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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FORMER CAPITAL CASE
QUESTIONS PRESENTED

Respondent Jackson Daniels murdered two police officers who had tried to arrest him for a prior robbery. Based in part on his paranoid delusion that defense counsel were conspiring with the prosecution to kill him, Daniels refused to cooperate with counsel at trial. Daniels was convicted and sentenced to death. After the California Supreme Court affirmed the judgment, the Ninth Circuit granted a writ of habeas corpus. In light of these facts, the questions for review are as follows:

1. When a criminal defendant refuses to cooperate with his counsel due to his subjective mistrust of them, (a) is he constructively denied his right to counsel? or (b) is counsel ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to overcome that impediment?

2. May defense counsel be found to have provided ineffective representation under *Strickland v. Washington*, based on the failure to investigate and present evidence regarding a defendant's mental health when trial counsel rely on the opinions of two mental health experts that the defendant does not suffer from mental illness?

3. When a state trial court denies a criminal defendant's change of venue motion, may a court of review presume prejudice based solely on pre-trial publicity and without regard to jurors' statements of impartiality during voir dire?

4. After *Brown v. Sanders*, 546 U.S. 212 (2006), can it be constitutional error for a California court to fail to instruct a capital sentencing jury, sua sponte, not to double count redundant multiple-murder "special circumstance" factors where the jury could consider the same underlying evidence as aggravating?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ROBERT L. AYERS, Warden, *Petitioner*,

v.

JACKSON CHAMBERS DANIELS, *Respondent*.

Robert L. Ayers, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 428 F.3d 1181. Petition Appendix ("App.") at 2a-55a. Its order denying rehearing en banc is unreported. App. at 1a. The order of the United States District Court for the Southern District of California denying the petition for writ of habeas corpus is unreported. App. at 56a-97a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on November 2, 2005. An order denying Daniels's petition for rehearing en banc was filed on November 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the

accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

1. In 1980, while fleeing from a bank robbery, respondent Daniels drove his car directly towards the patrol car of a pursuing police officer. The officer fired a shotgun blast, causing Daniels's car to go out of control. In an exchange of gunfire, police officers shot Daniels, causing permanent paralysis in his legs.

Daniels pleaded "no contest" to robbery and assault with a deadly weapon on a police officer and was sentenced to thirteen years in state prison. He posted bail pending the appeal of his convictions. When the state court denied Daniels's appeal, Andrew Roth, Daniels's attorney in the appeal of his robbery case, told Daniels the result and that he had to appear in court, but Daniels twice failed to appear in court as required.

On the morning of May 13, 1982, Riverside City Police Officers Dennis Doty and Phillip Trust went to the residence of James Cornish, where Daniels was temporarily staying, in order to arrest Daniels. Alma Renee Ross, who had agreed to work for Daniels as his attendant, admitted the officers. The officers identified themselves to Daniels, who was sitting on a bed in one of the bedrooms, and told him they had a warrant for his arrest.

Because Daniels was undressed, one of the officers asked Ross to get Daniels some clothes. While Ross was showing Daniels different pairs of shoes, Daniels reached between his legs, pulled out a gun, and pointed it at one of the officers.

Ross jumped into the bedroom closet. She heard gunshots and then got down on her knees and prayed. After a few minutes, Daniels called Ross out. She saw one police officer on the floor by the closet. Daniels was also on the floor, with an injury to his right hand. Ross later saw the other officer kneeling on the floor in another bedroom, hanging onto the bed and moaning. Ross had not seen anyone other than Daniels, the two police officers, and Cornish's infant son in the house at the time of the incident.

At Daniels's direction, Ross drove him to the home of Clara and Delores Butler in San Bernardino. During the drive, Daniels told Ross that he had to "pay them back because of what they had done to him." At the Butler residence, Daniels admitted shooting the officers.

Daniels later told a friend that, when one of the officers went to get some clothes for him, he "saw his opportunity and took it." According to Daniels, he pulled out his gun and shot at the officer who was getting his clothes out of the closet. The other policeman shot the gun out of Daniels's hand. Daniels rolled off the bed, managed to get the gun from the body of the officer near the closet, and then shot the second officer, who was running away down the hall.

The police investigation revealed that Officer Doty had been shot three times with an unidentified gun; Officer Trust had been shot six times, mostly with Officer Doty's weapon. After Daniels was arrested, one of the bullets fired from Officer Trust's gun was recovered from Daniels's hand.

2. Daniels was charged with two counts of first-degree murder. For each count the following "special circumstances"were alleged making him eligible for the death penalty: murder of a peace officer; murder to avoid arrest; and multiple murder. The Riverside County Public Defender's Office was originally appointed to represent Daniels at trial. The trial court denied Daniels's motion to substitute his former attorney, Roth. Roth nevertheless agreed to work on the case pro bono, and was later formally appointed as co-counsel. One

month after his appointment, however, the judge removed Roth from the case because he was a percipient witness insofar as he had notified Daniels that he would have to surrender himself. The Public Defender's Office later declared a conflict of interest. So the trial court appointed Carl Jordon, a former prosecutor with over a dozen years experience, to act as Daniels's lead counsel. The court appointed Warren Small to serve as co-counsel.

Prior to trial, Daniels brought a motion for change of venue, which the trial court deferred until jury selection. Although many of the sixty-four prospective jurors who were subsequently examined during voir dire expressed some familiarity with the case, four of the selected jurors had no recollection of the incident. Moreover, all of the selected jurors said unequivocally that they could set aside any impressions formed outside the courtroom and consider the evidence without prejudice. Defense counsel utilized only fifteen out of twenty-six peremptory challenges before agreeing to the jury as selected. Based on the jurors' responses during voir dire, the trial court denied the motion, finding that Daniels had failed to show the necessity for a change of venue.

The jury was sworn in late August 1983, over six months after Jordon and Small were appointed. At trial, the defense sought to prove that someone else, including Ross, her brother, or Cornish, committed the killings; that a bullet that struck Officer Trust did not come from the bed where Daniels had been sitting; that Daniels was physically incapable of holding a gun after being injured in the hand; and that Daniels bore no animosity towards the police officers despite the earlier shooting that rendered him a paraplegic.

Daniels evidently believed that his defense counsel were conspiring with the prosecution to have him executed, and so generally refused to cooperate with the defense. He never admitted to his attorneys that he was the shooter. The defense attorneys did not pursue a mental state defense, in part because two psychiatrists who examined Daniels, Dr. Robert Philips and Dr. Anthony Oliver, concluded that he did not suffer from any

mental defect.

In rebuttal, the prosecution introduced evidence that Cornish was at work at the time of the shooting, and elicited expert and eyewitness testimony that Daniels remained capable of holding and firing the gun. Further, the prosecution produced evidence that Daniels had told a nurse he was "sorry for getting his friends involved and he felt bad about what he did to the officers' wives."

On December 1, 1983, the jury found Daniels guilty of the first-degree murder of both officers—among other offenses—and the six special circumstances.

The penalty phase began on December 12, 1983. The prosecution proved a number of prior convictions, including an armed robbery in Arizona in 1959, and eight separate armed robberies Daniels committed in the Los Angeles area in 1961. In addition, in 1976, Daniels shot at two victims in a dispute over money. That same year, he pulled a gun—with a bullet ready in the chamber—on a police officer who had asked Daniels for identification. Daniels later told a neighbor that he had tried to fire the gun at the officer, but that the gun had jammed.

The defense presented a dozen witnesses who all testified to the effect that Daniels was not bitter at police, despite having been rendered a paraplegic, and that he never spoke of taking revenge. Psychologist Robert Banks, Ph.D., administered various psychological tests, which showed that Daniels exhibited confused or schizophrenic thinking. After consulting with two other experts concerning some of the test results, Banks opined Daniels may have suffered brain damage. Banks did not consider Daniels to have a sociopathic personality and attributed his past history of criminal actions to his schizophrenia.[1/] However, Banks believed Daniels capable of rehabilitation and positive change.

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1. Dr. Banks did not provide defense counsel with his opinions until after the jury had returned its guilt-phase verdicts.

In rebuttal, the prosecution presented its own psychologist who reviewed Banks's testimony and concluded Daniels suffered from a sociopathic personality disorder.

The jury affixed the penalty at death.

3. In January 1991, the California Supreme Court affirmed the judgment of death. *People v. Daniels*, 52 Cal. 3d 815, 802 P.2d 906, 277 Cal. Rptr. 122 (1991). The court rejected Daniels's assertions that he suffered presumptive prejudice from the trial court's failure to grant the change of venue motion and that it committed prejudicial instructional error by failing to admonish the jury not to "double count" the redundant multiple-murder special circumstances during penalty deliberations. *Id.* at 849-854, 876. On October 7, 1991, this Court denied Daniels's petition for a writ of certiorari.

In 1992, the California Supreme Court denied a petition for a writ of habeas corpus filed by Daniels. The court did not discuss the merits of Daniels's claims.

4. In October 1992, Daniels filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. Nearly a decade later, after holding an evidentiary hearing, the district court entered an order upholding Daniels's convictions for two counts of murder, but granting relief as to the death penalty. Both sides appealed.

5. On November 2, 2005, a three-judge panel of the Ninth Circuit reversed the district court as to the denial of the petition on the guilt phase and affirmed as to granting and directing issuance of the writ as to the penalty phase. App. at 2a-55a. In an opinion authored by Circuit Judge Pregerson, the Ninth Circuit held that: (i) Daniels was constructively denied his right to counsel when Daniels's paranoid delusions led to a complete breakdown of communication between him and his counsel; (ii) trial counsel rendered ineffective assistance at both penalty and guilt phases by failing to resolve the communication conflict with Daniels, and by failing to investigate mental health defenses/mitigation evidence; (iii) the trial court's failure to

grant a change of venue motion resulted in a presumption of prejudice at the penalty phase based upon the extent of pre-trial publicity; and (iv) the jury's finding of overlapping multiple-murder special circumstances for each victim was prejudicial error pushing the jury towards a death sentence because California is a "weighing state."

6. Petitioner petitioned for rehearing and rehearing en banc; on November 17, 2006, the court denied the petition. App. at 1a.

REASONS FOR GRANTING THE WRIT

Introduction

1. The Sixth Amendment guarantees to a defendant the right to a lawyer who performs effectively, *Strickland v. Washington*, 466 U.S. at 688, but not "a meaningful relationship with counsel," *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983). "A defendant cannot base a claim of inadequate representation upon his refusal to cooperate with appointed counsel. Such a doctrine would lead to absurd results." *Shaw v. United States*, 403 F.2d 528, 529 (8th Cir. 1968) (*per curiam*).

Unfortunately, it is precisely such an absurd result that the Ninth Circuit has reached in the present case. Here, the Ninth Circuit has concluded that a criminal defendant is constructively denied the right to counsel where he refused to cooperate with trial counsel because the defendant disagreed with the trial court's pre-trial rulings, wished to be represented by another attorney (who was unavailable because he was a witness for the prosecution), and distrusted his defense attorney because he was a former prosecutor who supposedly conducted an inadequate investigation. The Ninth Circuit's decision provides a detailed and easy to follow roadmap for every criminal defendant intent upon disrupting our system of criminal justice: A defendant will be able to overturn a death judgment simply by refusing to cooperate with counsel at trial.

This absurd result follows inexorably from the Ninth Circuit's reliance on the defendant's *subjective* evaluation of his

counsel's performance and the rulings of the trial court. The court, however, went even further in holding that the defendant's *unilateral* decision not to cooperate created a "conflict" that resulted in the constructive denial of counsel, thereby giving rise to a presumption of prejudice. But the Ninth Circuit did not stop there. It alternatively found that defense counsel provided ineffective assistance because they did not do more to resolve the "communication conflict." Aside from its sheer absurdity, the Ninth Circuit's decision directly conflicts with the requirements in *Strickland v. Washington* that a defendant must show both that counsel's performance fell below *objective* professional norms and that the defendant suffered *prejudice* as a result. Without citation to authority, the Ninth Circuit has adopted the position that the Sixth Amendment guarantees a defendant the right to have counsel prevent him from refusing to cooperate in his own defense. Such a rule cannot stand.

2. This Court should also grant certiorari to decide the important question, and resolve the conflict among the circuit courts, regarding when attorneys may rely on the opinions of mental health experts. Attorneys are neither psychiatrists nor psychologists. Yet, to practice law within the Ninth Circuit, attorneys must not only know the law for which they were trained, but they must also be more knowledgeable about mental health issues than the experts they retain. In the instant case, the Ninth Circuit ruled that defense counsel acted incompetently in relying on the opinions of two psychiatrists that Daniels did not suffer from mental illness, because the psychiatrists' reports did not indicate what testing or evaluation procedures were relied upon. The Ninth Circuit's ruling creates a direct conflict with the Fourth and Eighth Circuits, which have held that an attorney may reasonably rely on an expert mental health opinion even if the expert omitted standardized testing. Trial counsel require guidance as to when they may rely on the opinions of qualified experts.

3. The Ninth Circuit ruled that prejudice from the denial of

a change of venue motion could be presumed based solely on pre-trial publicity, without regard to the jurors' assurances of impartiality. This ruling creates an intolerable conflict with this Court's decisions that a reviewing court must consider the totality of the circumstances, including the jurors' responses during voir dire. *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Mu'Min v. Virginia*, 500 U.S. 415, 428-30 (1991).

4. Finally, the Ninth Circuit's ruling on the sentencing jury's "double counting" of an aggravating factor repeats the same error that this Court corrected just last Term in *Brown v. Sanders*, 546 U.S. 212, __, 126 S. Ct. 884, 893, 163 L. Ed. 2d 723 (2006). Here, the jury returned two multiple-murder special circumstances, one for each count of murder. Concluding that California is a "weighing state," the Ninth Circuit held that the trial court committed prejudicial error by failing to instruct the jury it could not double count the redundant special circumstance during penalty deliberations. In *Sanders*, however, this Court ruled that California was not a "weighing state"—and that, in any event, there is no prejudicial error where the jury remains authorized, as it was here, to consider the same underlying evidence in their sentencing consideration. There is no reason to believe the jury here was confused as to how many persons were shot, or how many multiple murders occurred.

A. The Ninth Circuit's Subjective Standard For Finding An Irreconcilable Conflict, And Its Presumption Of Prejudice Based On Such A Conflict, Is Contrary To This Court's Decisions

1. The Sixth Amendment does not guarantee "a right to counsel with whom the accused has a 'meaningful attorney-client relationship.'" *Morris v. Slappy*, 461 U.S. at 3-4. "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). As this Court has recently reiterated, the right to

counsel of choice does not extend to cases in which defendants require counsel to be appointed for them. *United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557, 2565, 165 L. Ed. 2d 409 (2006). In evaluating whether a defendant has received effective representation of counsel, "[T]he appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards *irrespective of his client's evaluation of his performance*." *United States v. Cronic*, 466 U.S. 648, 657 n. 21 (1984), italics added. In order to demonstrate that he received ineffective assistance of counsel, a defendant must prove: (i) counsel's deficient performance under an *objective* standard of professional responsibility; and (ii) prejudice under a test of reasonable probability of an adverse effect on the outcome. *Strickland v. Washington*, 466 U.S. at 688, 691-94.

2. Prior to any of these decisions, the Ninth Circuit concluded that a defendant may be denied the effective assistance of counsel where he becomes embroiled in an irreconcilable conflict, even if the defendant himself refused to cooperate or communicate with counsel. *Brown v. Craven*, 424 F.2d 1166, 1169-70 (9th Cir. 1970). Even in the Ninth Circuit's view, however, the defendant may not demonstrate "obstinance, recalcitrance, or unreasonable contumacy." *Id* at 1170.

3. In more recent decisions, including the present case, the Ninth Circuit has expanded on the concept of when an irreconcilable conflict may deny a defendant the Sixth Amendment right to counsel even when the defendant has sabotaged the relationship by refusing to cooperate. For instance, in *Plumlee v. Del Papa*, 465 F.3d 910 (9th Cir. 2006), the Ninth Circuit found an irreconcilable conflict where the defendant held an "objectively reasonable belief that his lawyers had betrayed him." *Id.* at 921. Notably, the trial court had concluded that the defendant's suspicions of disloyalty were untrue. *Id.* at 922. Nevertheless, the Ninth Circuit panel majority reasoned that "A defendant simply cannot be expected

to cooperate with attorneys he reasonably believes are working behind his back to undermine his defense." *Id.* at 922.

The Ninth Circuit's decision in the present case takes this conclusion another step further. Here, the Ninth Circuit went so far as to conclude that Daniels's refusal to cooperate was "understandable" given that: (i) the trial court had not acknowledged Daniels's conflict with the public defender until "close to trial"; (ii) the trial court refused to appoint Roth, who was Daniels's attorney of choice; (iii) the trial court appointed an inexperienced former prosecutor to represent Daniels; and (iv) trial counsel failed to conduct reasonable preparation. App. at 26a. Having found a "conflict" based on Daniels's subjective beliefs and unilateral actions, the Ninth Circuit further exacerbated its own jurisprudence by concluding the "conflict" amounted to a "constructive denial of prejudice," in which prejudice is presumed.

4. The test created by the Ninth Circuit for deciding whether there is an "irreconcilable conflict" is based solely upon the subjective beliefs of the defendant—that is, the defendant's evaluation of pre-trial rulings and the trial preparation of his counsel. Even if Daniels had known of counsels' trial preparation,[2] the Ninth Circuit simply disregards this Court's admonishment that "If counsel is a reasonably effective advocate, he meets constitutional standards *irrespective of his client's evaluation of his performance*." *United States v. Cronic*, 466 U.S. at 657 n. 21 (italics added). As previously noted, in order to demonstrate ineffective assistance of counsel, a defendant must establish counsel's deficient performance under an *objective* standard of professional responsibility. *Strickland v. Washington*, 466 U.S. at 688. The measure cannot "be

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2. The Ninth Circuit does not maintain that Daniels was even aware of what preparation his trial counsel had undertaken, because, of course, he refused to even communicate with them. App. at 26a-27a. Thus, the Ninth Circuit's conclusion that it was "understandable" Daniels refused to cooperate was based in part on alleged facts Daniels did not even know.

determined 'solely according to the subjective standard of what the defendant perceives.'" *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985). Such a rule, nonsensically, could award a defendant a new trial "simply on the basis of a 'breakdown in communication' which he himself induced." *McKee v. Harris*, 649 F.2d 927, 932 (2nd Cir. 1981).[3/]

5. The Ninth Circuit's decision would not only make the defendant the final arbiter of whether his counsel's performance is deficient, but *it would also do away with any need to show prejudice*. The Ninth Circuit concluded that the "conflict" gives rise to a presumption of prejudice. App. at 28a. This conclusion is directly contrary to this Court's decision in *Strickland*. In noting that prejudice is appropriately presumed in cases involving the actual or constructive denial of counsel, this Court observed that such circumstances "involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland v. Washington*, 466 U.S. at 692. This Court has never recognized a constructive denial of counsel based on facts even remotely resembling the present case. *See Plumlee v. Papa*, 465 F.3d at 943 (Bea, J. dissenting) (noting this Court's failure to recognize "irreconcilable conflict" doctrine); *United States v. Doe*, 272 F.3d 116, 125 (2nd Cir. 2001) (citing cases declining to presume prejudice based on a trial court's failure to inquire as to an "irreconcilable conflict").

6. For similar reasons, the Ninth Circuit was also misguided in alternatively concluding that defense counsel were ineffective in failing to overcome Daniels's mistrust of them and resolve the "communication conflict." App. at 31a-33a. The Ninth Circuit failed to provide any authority for the novel

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3. Remarkably, the Ninth Circuit reluctantly acknowledged that Daniels's paranoia and distrust of his lawyer "may have been unwarranted," yet even this acknowledgment did not alter the court's conclusions that Daniels's mistrust of his lawyer was "understandable." App. at 26a.

proposition that the Sixth Amendment places upon defense counsel the burden of ensuring their clients' cooperation.

The Ninth Circuit suggested defense counsel should have apprised the trial court of the extent of the communication conflict. App. at 32a. But the trial court could not have made Daniels cooperate any more than defense counsel could. The Ninth Circuit further offered that defense counsel did not "press" Daniels to testify. App. at 32a. Yet, the Ninth Circuit failed to explain how counsel should have "pressed" a client who would not communicate with them.[4/]

7. Hence, as a matter of law, none of the reasons cited by the Ninth Circuit renders Daniels's refusal to cooperate "understandable" or is sufficient to create a constructive denial of counsel. It is also worth noting that the Ninth Circuit's factual premises are unfounded and distorted. In the caricature drawn by the panel, the trial court failed in some duty to appoint Daniels' favorite lawyer Roth at public expense and instead saddled Daniels with a conflicted public defender until it became too late for the ultimately-appointed novice lawyer Jordon to put together a defense. The actual facts are that the trial court appropriately appointed the public defender in the normal course and declined to remove him in the absence of any assertion by the public defender that he could not proceed in the case. When that indeed happened, the trial court appointed

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4. The subtext underlying the circuit court's critique of the counsel afforded Daniels and their performance is this: Had Daniels been appointed counsel he trusted (presumably, Roth), counsel could have convinced Daniels to testify and admit killing the officers and then offer some excuse or justification for the killings. The problem with this scenario is twofold: (i) no court has ever held counsel is ineffective for failing to persuade his client to testify - a decision which rests exclusively with the defendant; and (ii) there has never been evidence produced that Daniels desired to testify (and admit to the murder of two police officers) or that he had a story to tell which would have altered the outcome of the trial. The scenario that a trusted, competent counsel could have induced Daniels to testify and avoid a capital conviction and penalty is a contrivance of appellate judges exercising wishful thinking.

Daniels two independent lawyers—one with a dozen years of experience as a criminal trial lawyer with the district attorney's office—approximately six months before trial commenced. App. at 9a. The only reason they did not have longer to prepare was that *Daniels refused to waive time*. App. at 11a, n. 8. Under the Ninth Circuit's view, Daniels was free to torpedo his trial because of his disagreement with rulings made *months* before trial even started. Further, even though the trial judge was never required to appoint Roth, respondent's personal choice, it nevertheless did so but later was constrained to relieve him, properly, when it became clear he would be a witness in the trial. Finally, the Ninth Circuit's assertion that trial counsel failed to conduct adequate preparation is also incorrect, as discussed more thoroughly in the following subsection.

In *Morris v. Slappy*, 461 U.S. at 4, this Court reversed a similar ruling by the Ninth Circuit. There, the defendant refused to cooperate with counsel, who was appointed *only six days* before trial and who the defendant believed did not have adequate time to prepare. After noting the defendant's claim that the trial court's refusal to grant a continuance resulted in an "irreconcilable conflict," this Court ruled, "The facts shown by the record conclusively rebut [this] claim[] and are alone dispositive, independent of the correctness of the novel Sixth Amendment guarantee announced by the Court of Appeals." *Id.* at 4.

8. Under the panel's novel decision, a defendant can avoid the objective standards of professional competence under *Strickland*, or any showing of prejudice, and based upon his own evaluation of his attorney and his unilateral unwillingness to cooperate, obtain reversal of a conviction. If allowed to stand, the Ninth Circuit's decision instructs any capital defendant how to avoid the death penalty simply by refusing to cooperate with trial counsel. Certiorari must be granted in the present case to decide this important issue of law, as well as prevent the Ninth Circuit from ignoring this Court's decisions in cases such as *Strickland v. Washington* and *Morris v. Slappy*

B. The Ninth Circuit Decision Creates A Conflict Among The Circuit Courts Regarding When Defense Counsel May Rely On The Opinions Of Experts When Formulating Their Defense Strategy

This Court must grant certiorari to decide the split in the federal circuit courts over when defense counsel may reasonably rely on expert mental health opinions when formulating trial strategy.

1. Numerous decisions from circuit courts outside the Ninth Circuit have recognized that an attorney does not render ineffective assistance by failing to "shop around" for a favorable expert opinion after a defendant has been evaluated by a mental health expert. *See, e.g., Winfield v. Roper*, 460 F.3d 1026, 1040-41 (8th Cir. 2006) (counsel had no duty to shop for a new expert after defendant had been examined by two experts); *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir. 2003) (no duty to obtain third opinion where two experts did not suggest defendant suffered from mental illness); *Sidebottom v. Delo*, 46 F.3d 744, 752-53 (8th Cir. 1995) ("'[W]e have never suggested [that] counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion.'"); *Poyner v. Murray*, 964 F.2d 1404, 1418-20 (4th Cir. 1992) ("The mere fact that [defendant's] counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance."). As such decisions recognize, defense counsel are entitled to rely on expert opinions when formulating their defense strategies. *See, e.g., Walton v. Angelone*, 321 F.3d at 466.

Notably, different panels of the Ninth Circuit have likewise recognized that defense counsel may reasonably decline to further investigate or pursue a mental-state defense when two mental health experts have concluded that such a defense was not available—even in capital cases. *Moran v. Godinez*, 57 F.3d 690, 699 (9th Cir. 1995); *Harris v. Vasquez*, 949 F.2d 1497,

1525 (9th Cir. 1991); *see also Williams v. Woodford*, 384 F.3d 567, 611 (9th Cir. 2004) (reliance on three mental health opinions).

2. Here, the Ninth Circuit broke with this authority. Prior to trial, two psychiatrists, Dr. Oliver and Dr. Philips, examined Daniels, finding no evidence of psychosis, organic brain disease, or psycholpathology. As Dr. Oliver expressed in his written report, "I very much doubt that mental incapacitation from defect, disease or toxic substance would likely be a factor in this case." Dr. Oliver reached this conclusion after spending three hours with Daniels. Although Daniels refused to discuss personal data or details surrounding the charges because he believed the conversation was being monitored, Dr. Oliver was nonetheless able to establish a "rapport" with Daniels and reach his opinion that Daniels was competent to stand trial.

Dr. Philips evaluated Daniels during the course of nine psychotherapeutic sessions in 1980, and an additional session in October 1982. In total, Dr. Philips "stud[ied]" Daniels for over twelve hours. In a report to counsel, Dr. Philips observed that they had developed a good relationship, and that there was "no evidence of psychosis, or organic brain disease."

The Ninth Circuit found defense counsel provided ineffective assistance by failing to adequately investigate Daniels's purported mental illness; in so concluding, it dismissed and disregarded defense counsels' reliance on these two expert opinions. In a footnote, the Ninth Circuit maintained that defense counsel were not reasonable in relying on the opinions of the two psychiatrists because counsel knew Dr. Oliver had not been able to examine Daniels because he did not cooperate and nothing in Dr. Phillips's letters to counsel[5/] indicated that he conducted any testing evaluation procedures, or structured assessment of Daniel's mental state. App. at 38a, n. 28.

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5. In one of the reports, Dr. Phillips noted he had "stud[ied]" Daniels for over twelve hours, assessed Daniels's intelligence, and discussed Daniels's emotional and social immaturity.

3. In so concluding, the Ninth Circuit created a new rule that counsel may not rely on the opinions of experts and that attorneys must know what psychological tests are minimally necessary to assess a client's potential mental defenses. The problem with this position, of course, is that attorneys are not experts in psychiatry or psychology, nor should they be required to be so in order to be considered minimally competent. As this Court has recognized, the Constitution requires courts to consider "'not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *Untied States v. Cronic*, 466 U.S. at 665, n. 38.) The Ninth Circuit's position is squarely at odds with that of the Fourth and Eighth Circuits, which have rejected claims that an attorney may not rely on a psychiatric evaluation even where the expert does not administer standardized testing to determine brain dysfunction, or where the expert fails to conduct a neuropsychological evaluation, or other psychological tests. *See, e.g., Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998); *Six v. Delo*, 94 F.3d 469, 473-74 (8th Cir. 1996); *Sidebottom v. Delo*, 46 F.3d at 753; *Poyner v. Murray,* 964 F.2d at 1416-19.

Although couched as an ineffective counsel claim, Daniels's complaint is not directed at counsel's competence, but instead at the competence of the expert, and there is no constitutional right to effective assistance of expert witnesses. *See, e.g., Campbell v. Polk*, 447 F.3d 270, 285 (4th Cir. 2006). Indeed, as a different panel of the Ninth Circuit has recognized, "If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." *Hendricks v. Calderon*, 70 F.3d 1032, 1039 (9th Cir. 1995). "To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices." *Id. See also Babbitt*

v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) ("while there may be a duty to seek out psychiatric evaluation of a client where appropriate, there is no duty to ensure the trustworthiness of the expert's conclusions.") Here, neither of the psychiatrists suggested a need for further evaluation or testing; nor was there any reason to believe the psychiatrists were not competent. It is unreasonable to require an attorney to second guess a trained professional as to what testing is required. Certainly, the objective professional norms prevailing in 1982 did not require such a conclusion.

4. Once again, it is worth noting that the factual conclusions underlying the Ninth Circuit's decision are wholly unfounded. For the first time by any court, the Ninth Circuit made a factual finding that "Oliver did not *speak* with Daniels, who refused to cooperate in the attempted examination." App. at 14a, n. 13, italics added. Yet, Dr. Oliver and Daniels clearly spoke when they met for three hours and developed a rapport.

The Ninth Circuit also asserted that defense counsel believed Daniels suffered from mental illness and that they did not properly follow up on Dr. Banks's preliminary examination indicating schizophrenia and paranoia. App. at 35a-36a. However, there is no evidence that Dr. Banks informed defense counsel of his opinions concerning potential mental illness until *after* the guilt phase was completed. As the Ninth Circuit correctly recognized, defense counsel did not call Dr. Banks to obtain a psychological diagnosis, but rather as a penalty witness to testify as to his general impressions that Daniels would probably remain a productive person if his life were spared. (App. at 14a-15a; February 24, 2000, evidentiary hearing transcript at 48-9.) At the evidentiary hearing, defense counsel Jordon testified he received Dr. Banks's report on the morning he was called to testify at the penalty phase. (February 24, 2000, evidentiary hearing transcript at 46-7.) Indeed, in his opening brief to the Ninth Circuit, Daniels acknowledged that his counsel had obtained no report from Dr. Banks, and "had not been able to consult with his expert to prepare the testimony in

any detail."

Thus, prior to the start of the penalty phase, defense counsel had no reason to suspect Daniels had an available mental illness defense.[6] Before the Ninth Circuit's decision, no court, including the district court, which heard the testimony at the evidentiary hearing, found that defense counsel were aware of Dr. Banks's opinion before the penalty phase. Notably, the Ninth Circuit made no finding (express or implied) as to when defense counsel learned of Dr. Banks's opinion; instead, the court simply blurred all the facts together, disregarding when counsel learned of them.[7]

After Dr. Banks testified, defense counsel consulted with Dr. Skidmore in order to prepare for the prosecution's penalty case. Nothing suggests there was anything defense counsel could or should have done in the middle of the penalty phase to obtain

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6. The Ninth Circuit asserted that defense counsel would have been tipped off regarding a potential mental defense had they reviewed prison hospital records. App. at 36a. But again, this begs the question whether counsel had a duty to investigate such records in light of their reliance on the opinions of two psychiatrists. *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("A failure to obtain available records, however, does not show that counsel's investigation was inadequate."). Unlike *Rompila v. Beard*, 545 U.S. 374 (2005), which the Ninth Circuit cited, this was not a case in which defense counsel failed to review "material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Id.* at 377. Unlike a record of a prior conviction as in *Rompila*, there can be no claim that competent defense counsel would have anticipated the prosecution's use of hospital records that did not bear upon the prior offenses and that were separate from the record of Daniels's prior criminal acts. This distinction is especially notable given the Ninth Circuit's conclusion that defense counsels' performance was inadequate not just at the penalty phase, but even at the guilt phase.

7. The Ninth Circuit noted that Dr. Banks attempted to obtain the assistance of neuropsychology experts for further evaluation. However, there is no evidence he undertook such efforts before the penalty phase. An affidavit of Sherry Skidmore, Ph.D., reveals he met with Dr. Banks in January 1983 – over a month after the jury had returned its guilty verdicts. (Daniels's Ninth Circuit excerpts of record at 237.)

additional testing or expert testimony.

5. The Ninth Circuit's decision creates a direct conflict between the Fourth and Eighth Circuits. This Court should grant certiorari to decide this important question.

C. The Test Employed By The Ninth Circuit To Determine Whether Prejudice Must Be Presumed From The Failure To Grant A Change Of Venue Motion Is Contrary To Decisions By This Court And Fails To Consider The Jurors' Responses During Voir Dire

Certiorari must be granted in order to resolve the direct conflict between *Murphy v. Florida,* 421 U.S. at 799, and the Ninth Circuit's decision presuming prejudice from the denial of a change of venue motion without regard to the jurors' assurances of impartiality.

1. Riverside County abuts Los Angeles County. At the relevant time period, it had a population of over 600,000 persons. *People v. Daniels*, 52 Cal. 3d at 852. On direct appeal, Daniels argued the trial court violated his constitutional rights by denying the change of venue motion. The California Supreme Court rejected this claim, making a number of factual findings in the process. The court discussed the media attention in the days after the shootings, which diminished after Daniels's arrest, and then resumed as trial approached. The court further discussed a statue to fallen officers located outside the courthouse where Daniels was tried.

Turning to the voir dire responses of the jurors, the California Supreme Court observed that sixty-four prospective jurors were examined:

> Most expressed some familiarity with the case. Of the jurors selected, four had no recollection of the incident. The others recalled the police officers were shot; some recalled that the suspect was a Black paraplegic; two remembered Daniels' name. All said unequivocally that they could set aside any

> impressions formed outside the courtroom and consider the evidence without prejudice.

People v. Daniels, 52 Cal. 3d at 850.

The California Supreme Court discussed the size of the county and the number of jurors who had heard of the case. The decisive factor, however, was that Daniels's trial counsel used only fifteen of twenty-six peremptory challenges, and did not object to the jury as ultimately composed. As the court explained, this inaction demonstrated counsel's recognition that the jury as selected was fair and impartial. *People v. Daniels*, 52 Cal. 3d at 853-54.

2. On federal habeas corpus, the Ninth Circuit held the trial court violated Daniels's right to a fair and impartial jury, and therefore denied him due process, by denying the change of venue motion. In reaching this holding, the Ninth Circuit recognized that it could not conduct an independent review of pre-trial news coverage, and therefore purported to rely on the factual findings by the California Supreme Court. App. at 48a-50a. Because Daniels conceded there was no evidence of actual prejudice, the Ninth Circuit went on to find there was a presumption of prejudice based on its consideration of the following test:

> Three factors should be considered in determining presumed prejudice: (1) whether there was a "barrage of inflammatory publicity immediately prior to trial, amounting to a huge. . . wave of public passion"; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial.

App. at 48a (citing *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998), *as amended*, 152 F.3d 1223). After considering each of these factors, the Ninth Circuit determined, "The nature and extent of the pre-trial publicity, paired with the fact that the

majority of actual and potential jurors remembered the pretrial publicity warranted a change of venue." App. at 50a.

3. In *Murphy v. Florida*, 421 U.S. 794, this Court clarified several prior decisions concerning pre-trial publicity, ruling that any presumption of prejudice in such cases must be based on the "totality of circumstances" and that "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged" do not alone presumptively deprive a defendant of due process. *Id.* at 799. Turning to the voir dire responses, this Court found no evidence that any partiality by the jurors could not be laid aside. This Court found only one juror who exhibited a colorable claim of partiality, and noted that only twenty of the seventy-eight prospective jurors were excused because they expressed an opinion as to the defendant's guilt. *Id.* at 803.

4. The Ninth Circuit's test for determining presumed prejudice is directly contrary to this Court's decision in *Murphy*. Each of the three factors considered by the Ninth Circuit relates exclusively to juror exposure to news accounts of the crime and pretrial publicity. At no point does the Ninth Circuit's test even consider the jurors' ability to set aside such publicity, or, more generally, their responses during voir dire.

Tacitly recognizing this deficit, the Ninth Circuit attempted to insert a bare reference to the actual responses of the jurors as an apparent afterthought in its conclusion. As noted above, the court concluded without further discussion that a change of venue was required based the nature and extent of the pre-trial publicity "paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity." App. at 50a.

5. The mere fact that seated jurors have heard of a case prior to trial is not a sufficient basis for finding a presumption of prejudice. *Mu'Min v. Virginia*, 500 U.S. at 428-30 (finding no presumption of prejudice where eight of twelve seated jurors had heard of case, but none had formed an opinion as to guilt or indicated an inability to judge case on evidence presented); *Irvin v. Dowd*, 366 U.S. 717 (1961) (jurors need not be "totally

ignorant of the facts and issues involved"; instead, it is sufficient "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.") Significantly, although the Ninth Circuit purported to adopt the factual findings of the California Supreme Court, the Ninth Circuit made no reference to the fact that all seated jurors stated unequivocally that they could set aside any impressions formed outside the courtroom and consider the evidence without prejudice.

Unlike *Irvin v. Dowd*, 366 U.S. 717, this was not a case where the assurances of the seated jurors that they would be impartial could not be believed. There, this Court found that a "'pattern of deep and bitter prejudice' shown to be present throughout the community" prevented a fair trial. *Id.* at 727. After reviewing the extensive publicity, which included the fact that the petitioner had failed a lie detector test, had confessed, and had offered to plead guilty, the Court observed that the trial court had to excuse 268 persons (out of a panel of 430) for cause. Another 103 jurors were excused because of conscientious objection to the imposition of the death penalty, and the parties peremptorily challenged 30. Fourteen jurors were selected and all the rest were excused for personal grounds. *Id.* at 727. Finally, *eight of the twelve seated jurors had formed the opinion that the petitioner was guilty.* Based on these facts, this Court found it difficult to believe that the jurors could exclude their preconceptions from their deliberations. As this Court expressed, "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Irvin v. Dowd* 366 U.S. at 728.

The present case is completely different both in terms of the type of community, the nature of the coverage, and the responses of the jurors. Riverside County, unlike the community in *Irvin*, is a large metropolitan community. Because of its proximity to Los Angeles, murders are, unfortunately, all too common. As the California Supreme Court concluded, as demonstrated by defense counsel's failure to exercise all his

peremptory challenges, the responses of the jurors that they would be impartial were credible and worthy of belief.

Notably, the Ninth Circuit did not find that *Irvin* controlled; it simply ignored the jurors' oaths of impartiality completely.

6. Certiorari is necessary in order to prevent the Ninth Circuit from undermining this Court's holding in *Murphy v. Florida* by omitting any consideration of the jurors' statements of impartiality, or finding that such assurances of impartiality could not be believed under *Irvin v. Dowd*.

D. The Ninth Circuit's Conclusion That The Trial Court's Failure To Instruct The Jury Not To Double Count A Superfluous Multiple-Murder Special Circumstance Was "Not Harmless" Is Contrary To, And Stands To Undermine, This Court's Decision In *Brown v. Sanders*

The Ninth Circuit's conclusion that California is a "weighing state," and therefore the trial court's failure to instruct the jury not to double count a redundant multiple-murder special circumstance was prejudicial, is directly contrary to this Court's decision in *Brown v. Sanders*, 546 U.S. 212.

1. Multiple murder is a special circumstance in California, rendering the defendant eligible for the death penalty. Cal. Penal Code § 190.2(a)(3). Daniels's jury returned two multiple-murder special circumstances, one for each victim. On direct appeal, the California Supreme Court found the second special circumstance to be superfluous, and set it aside. The court concluded the redundant finding was not prejudicial because there was nothing at trial, in the arguments, or in the instructions calculated to create the impression that two murders were more heinous because two multiple-murder special circumstances had been charged. *People v. Daniels,* 52 Cal. 3d at 876.

The Ninth Circuit found the double counting error "not harmless." App. at 50a-54a. The Ninth Circuit held that California's 1978 death penalty law, under which Daniels was

convicted, turned California into a weighing state. Because it found California was a weighing state, the court further concluded that under this Court's decision in *Stringer v. Black*, 503 U.S. 222, 232 (1992), the use of an improper aggravating factor was one of critical importance and violated the Constitution. Coupling the error with the other penalty phase errors it had already found, the Ninth Circuit held the trial court's failure to instruct the jury that it could not double count the special circumstances gave the jury "one more improper reason to tip the scales against Daniels." App. at 54a.

2. The panel's conclusion is directly contrary to this Court's decision reversing the Ninth Circuit for the same mistake in *Brown v. Sanders*, 546 U.S. 212. As *Sanders* made clear, California remains, under the 1978 death penalty law, a non-weighing state. *Id.* at 126 S. Ct. at 893. Nor does it even matter under *Sanders* whether California is a "weighing" state. The dispositive question in cases involving an invalid sentencing factor is, instead, whether "one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Sanders*, 126 S. Ct. at 892. In the instant case, the erroneous factor could not have skewed the sentence. The multiple murders constituted aggravating evidence. And, regardless of the "special circumstance" denomination, the jury knew precisely how many officers Daniels had murdered. There is no reason to believe the jury would have found Daniels more culpable or worthy of a death sentence simply because each murder count carried with it a separate multiple-murder special circumstance. Thus, as *Sanders* makes clear, there was no constitutional error at all.

Review of the Ninth Circuit's decision is necessary because it flatly contradicts this Court's decision in *Sanders*.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: February 13, 2007

Respectfully submitted,

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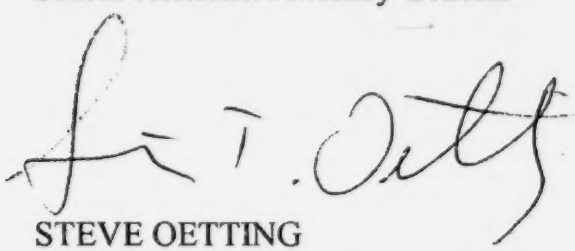

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APPENDIX A

[Filed November 17, 2006]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JACKSON CHAMBERS DANIELS, JR., Petitioner-Appellee, v. STEVEN W. ORNOSKI, Warden, Respondent-Appellant.	Nos. 02-99002 & 02-99003 D.C. No. CV-92-04683-JSL Central District of California, Los Angeles ORDER

Before: B. FLETCHER, PREGERSON, and FERGUSON, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judge Pregerson has voted to deny the suggestion for rehearing en banc, and Judges B. Fletcher and Ferguson have so recommended. The petition for rehearing en banc has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON CHAMBERS DANIELS, JR., *Petitioner-Appellee*, v. JEANNE S. WOODFORD, Warden, of California State Prison at San Quentin, *Respondent-Appellant.*	No. 02-99002 D.C. No. CV-92-04683-JSL
JACKSON CHAMBERS DANIELS, JR., *Petitioner-Appellee*, v. JEANNE S. WOODFORD, Warden, of California State Prison at San Quentin, *Respondent-Appellant.*	No. 02-99003 D.C. No. CV-92-04683-JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
February 10, 2004—Pasadena, California

Filed November 2, 2005

Before: Betty B. Fletcher, Harry Pregerson, and
Warren J. Ferguson, Circuit Judges.
Opinion by Judge Pregerson

COUNSEL

John T. Philipsborn, San Francisco, California and John G. Cotsirilos, San Diego, California, for the petitioner-appellee/cross-appellant.

Warren P. Robinson, Deputy Attorney General, San Diego, California, for the respondent-cross-appellant/appellee.

OPINION

PREGERSON, Circuit Judge:

Jackson Chambers Daniels, Jr., is a sixty-six-year-old paraplegic on California's death row. On December 1, 1983, Daniels was convicted of two counts of first-degree murder for the shooting deaths of police officers Dennis Doty and Phil Trust.

Daniels shot and killed the officers when they attempted to take him into custody following the denial of his appeal on an earlier robbery conviction. Daniels was sentenced to death on January 31, 1984.

I. Events Prior to the Instant Offense

To understand the circumstances of the murders of officers Doty and Trust, it is necessary to first review the events surrounding a bank robbery Daniels committed in 1980. Attempting to flee from that robbery, Daniels was shot nine times by police officers. As a result of the shooting, Daniels was rendered a paraplegic and confined to a wheelchair. Pursuant to a plea agreement negotiated by Daniels's public defender and the prosecutor, Daniels agreed to plead guilty in exchange for being permitted to remain free on his own recognizance for six months so that he could seek medical treatment and rehabilitation for his injuries. Despite this plea agreement, after Daniels pled guilty, the trial court sentenced him to thirteen years in prison and remanded him to immediate custody.

On the same day Daniels was sentenced, attorney Andrew Roth, who knew Daniels from prior representations, met Daniels in the hall of the court house. Roth later testified that Daniels appeared to be "in great distress due to improper medical care." Roth later visited with Daniels in custody and, although Daniels's physical distress was somewhat lessened, Roth was disturbed by Daniels's psychological condition and expression of suicidal thoughts. After this meeting with Daniels, Roth took over Daniels's case and appealed the robbery conviction on the ground that the plea agreement had been violated because the trial court did not permit Daniels to seek six months of rehabilitation and treatment before surrendering to custody. During the pendency of that appeal, Daniels was released on bond.

In 1981, while Daniels remained free on bond, a Riverside police officer mistakenly arrested Daniels on the erroneous belief that a warrant had been issued for his arrest. In a suit for money damages filed in state court against the City of Riverside, Daniels alleged that while in custody, he was beaten, dragged into a jail cell without his wheelchair, and denied necessary medical care, including a catheter. As a consequence, Daniels required treatment for urine poisoning and became fearful of being returned to custody. According to Daniels, he feared incarceration because the prison system lacked the medical professionals and supplies necessary to provide the care he needed as a paraplegic.

II. The Current Offense

In April 1982, the California Court of Appeal denied Daniels's appeal of his bank robbery conviction, and Daniels was ordered to surrender to custody. When he failed to appear at two hearings as ordered, a warrant was issued for his arrest. On May 13, 1982, officers Doty and Trust were sent to arrest Daniels at the residence of James Cornish.

When the officers arrived at the Cornish home, they were shown to Daniels's bedroom by his caretaker, Renee Ross. According to Ross, only she, Daniels, the two officers, and Cornish's infant son were in the house at the time. The officers found Daniels sitting on his bed wearing only a shirt. While Ross was assisting Daniels with getting dressed, Daniels reached between his legs and produced a gun. When Ross saw Daniels with the gun, she ducked into a bedroom closet. From inside the closet, Ross heard gunshots in the bedroom.

After the gunfire stopped, Daniels called Ross out of the closet. Ross saw Daniels sitting on the floor with a gunshot wound in his right hand. Doty was lying on the floor. At Daniels's direction, Ross assisted Daniels into his wheelchair. As they left the house, Ross saw Trust in another bedroom, kneeling on the floor.

Daniels instructed Ross to drive to Delores Butler's home. During the drive, Daniels told Ross that he had "pa[id] them back because of what they had done to him" and that the police had previously shot him nine times. When Butler asked about the injury to his hand, Daniels admitted killing the two officers. With Ross's help, Daniels then fled to Ted Smith's house, where he was later apprehended by the police.

Before his arrest, Daniels told Ted Smith what had happened that morning. According to Smith, Daniels told him that after he shot Doty, Trust shot the gun out of his hand. When Daniels fell to the floor, he got Doty's gun and used that to shoot Trust. Ballistics evidence supports Daniels's confession, showing that (1) Doty was shot three times from an unidentified gun; (2) Trust had fired four bullets, three of which were recovered in the house, the fourth in Daniels's hand; and (3) Trust had been shot six times, primarily with Doty's gun.

III. Appointment of Counsel

The trial court appointed the Riverside County Public Defender's Office to represent Daniels during the trial on the murder charges. At his arraignment, Daniels was represented by Patricia Lahti, but Daniels moved to have attorney Roth substituted as his counsel.[1] Roth, who also attended Daniels's arraignment, advised the court that he was available to represent Daniels.

As the basis for his motion to substitute counsel, Daniels explained to the trial court that he had a conflict of interest with the Public Defender's Office, which had represented him in plea negotiations concerning the 1980 robbery arrest. The conflict arose when, unknown to Daniels, his public defender in the robbery case, Patrick Magers, simultaneously engaged in

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[1] Daniels specified Roth because Roth was an established criminal defense attorney with whom Daniels had a relationship of trust and confidence.

negotiations with the District Attorney's Office for Daniels's plea and—acting in his own interest—for a position within the same District Attorney's Office. Indeed, after Daniels accepted the plea agreement, Magers left the Public Defender's Office to work in the District Attorney's Office, and Daniels was assigned a new public defender for his sentencing hearing. Neither the prosecutor nor the public defender who replaced Magers apprised the court of the plea agreement's condition permitting Daniels to seek treatment in lieu of immediate incarceration. This is why, at the sentencing hearing, Daniels was remanded to immediate custody.

Patricia Lahti, Daniels's public defender at his arraignment on the murder charges, notified the court that Daniels had filed a federal habeas petition alleging that the public defender in his robbery case had provided ineffective assistance of counsel.[2] Although she believed it was "close," she declined to state that a conflict existed.[3] Nevertheless, Lahti urged the court to appoint Roth as Daniels's counsel, advising the court that Daniels mistrusted the Public Defender's Office, would not cooperate with it in his representation, and that she could not assure Daniels that the office would effectively represent him.

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[2] As the district court pointed out, because the robbery conviction would be introduced as evidence at the murder trial, Daniels's public defender would be required to argue that the office had provided ineffective assistance of counsel in the robbery case. But, if Daniels's habeas petition was still pending, the office would be required to defend the conviction in that proceeding.

[3] Lathi lacked the authority to declare a conflict without the approval of head Public Defender Malcolm McMillian. McMillian, however, refused to declare a conflict. At about this time, McMillian's office had come under fire: McMillian was under investigation for his management of the office by a Grand Jury and by a two-member panel appointed by the Riverside County Board of Supervisors. Part of this investigation inquired into complaints that McMillian was declaring too many conflicts and thereby causing the County of Riverside to expend additional funds on alternate counsel to represent indigent defendants.

Despite this evident conflict, the trial court denied Daniels's motion to substitute counsel.[4] At Roth's urging, Deputy Public Defender Robert Keller undertook representation of Daniels after Roth promised that he would work on Daniels's case pro bono. Keller himself voiced strong reservations about the appointment, writing to Public Defender McMillian that there was an "obvious" conflict of interest in the Office's representation of Daniels and asking McMillian to withdraw from the case. After the Office again refused to declare a conflict, Keller became the attorney of record, while Roth took the actual lead in the case.

Roth was appointed co-counsel on October 15, 1982. One month later, the prosecution moved to have Roth removed on the ground that the state intended to call him as a witness to testify regarding Daniels's robbery conviction and appeal. According to the prosecution, Roth's testimony was necessary to establish that Daniels knew that his appeal had been denied and that he was to return to custody. Under the prosecution's theory of the case, whether Roth told Daniels to surrender to custody was material on the issues of premeditation, deliberation, and malice aforethought.

In opposing the motion, Roth argued that the attorney-client privilege prohibited him from revealing his communications with Daniels and that, in any event, evidence on these issues was available through other sources.[5] In addition, Daniels

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[4] After this ruling, Lahti again urged the court to appoint Roth, stating that the office had not ruled out a conflict. According to Lahti, "It's very rare that a defendant walks into court and asks our office be removed because he is suing us literally for incompetency and has an active case on appeal or before the court."

[5] For example, in a declaration filed with his habeas challenge to his robbery conviction, Daniels stated that the California Supreme Court had denied his appeal. This declaration was dated April 20, 1982, and would have established that Daniels knew the appeal had been denied before he

agreed to stipulate that Roth had informed him about the denial of his appeal and had advised him to surrender. Daniels also agreed to waive all conflicts after Roth arranged for him to consult with separate counsel. Despite these assurances, the trial court removed Roth, leaving Keller as Daniels's only counsel.

One month later, Keller became too ill to work on Daniels's case, and it was assigned to two other deputy public defenders. Two months later, Daniels's new counsel recommended to a new head Public Defender that the Office withdraw as counsel due to a conflict of interest in its representation of Daniels. Consequently, more than nine months after its appointment, the Public Defender's Office was permitted to withdraw as counsel based on its declared conflict of interest, the same conflict Daniels had raised at his arraignment.

The trial court did not re-appoint attorney Roth to replace the public defender. Instead, the court appointed Carl Jordan, a former Riverside County prosecutor who had just started in solo private practice. Daniels's capital murder case was Jordan's first criminal defense matter. Indeed, Jordan had never handled a death penalty case as either a prosecutor or defense attorney, and his new office lacked the administrative and legal resources necessary to defend such a case. Jordan hoped the case would lead to future appointments.

To assist Jordan, the trial court appointed Warren Small as co-counsel. At the time he was appointed, Small had been practicing law for two and a half years as a solo practitioner and had no experience trying homicide cases. Like Jordan, this was Small's first capital case. Despite his inexperience, Small was tasked with preparing all pleadings, legal arguments, and jury instructions that would be necessary during the trial. He was also given responsibility for preparing the penalty phase defense in consultation with Jordan.

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was to surrender and before officers Doty and Trust came to arrest him.

From the beginning of their representation, the attorney-client relationship between Daniels and his defense counsel was strained. Daniels questioned whether Small had sufficient experience to properly handle his defense. More importantly, Daniels suspected Jordan's motives in representing him because of Jordan's past experience as a Riverside County prosecutor, a factor that Daniels believed made Jordan easier for the court and district attorney to control. To Daniels, it appeared that Roth had been removed as his counsel at the behest of the district attorney because he was a strong advocate on Daniels's behalf. Daniels viewed Roth's removal as part of a larger conspiracy between the police, courts, and district attorney to prevent Daniels from presenting a defense and thereby ensure his execution.[6] Daniels believed his defense team was part of this conspiracy and that Jordan had been appointed to hasten his conviction and death sentence.[7]

The trial court was aware of the conflict between Daniels and his counsel. On June 3, 1983, Daniels told the trial court "I don't trust Mr. Jordan and there has been some things that happened that has increased my doubt about him properly representing me." Before the guilt phase of his trial began, Daniels sent a letter to the trial court informing the court that he did not trust his counsel. *People v. Daniels*, 802 P.2d 906, 918 (Cal. 1991). In this letter, Daniels expressed his belief that his attorneys' representation was ineffective, that they were not interested in providing effective representation and were, in fact, talking to the prosecution outside of his presence. Daniels also expressed his belief that there was a conspiracy to kill him.

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[6] Daniels also belief that his erroneous arrest in 1981 was part of a police plot to kill him.

[7] Roth, who spoke with Daniels during the time, believed that Daniels's distrust of Jordan and Small seemed unrealistically extreme."

By the time Jordan and Small were appointed as defense counsel, they were left with roughly three months to prepare Daniels's defense.[8] This short time was exacerbated by the lack of preparation done on the case during the public defender's nine month tenure.[9] When Jordan and Small took over, very little work, if any, had been done to investigate Daniels's mental state as possible mitigating evidence. No psychiatric or psychological testing had been done. In addition, there had been no investigation of the crime scene by defense counsel and, by the time Jordan was appointed more than nine months later, much of the evidence was no longer available, and the crime scene had been cleaned and repaired by the owner of the home. Thus, Jordan and Small had approximately three months to do the bulk of the investigative and trial preparation for both the guilt and penalty phases in their first capital murder case and no access to the crime scene or to other evidence.

This exceedingly short period of time was further aggravated by the inability of counsel to meaningfully consult with their client as a result of Daniels's paranoia and distrust. According to Small, because of Daniels's experiences prior to their appointment—including the removal of Roth, the conflict with the Public Defender's Office, and that office's failure to timely declare a conflict—it was "difficult to establish the relationship of trust and confidence that should characterize the attorney-client relationship."[10] Instead, Daniels's lack of trust and

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[8] Indeed, in moving for a continuance, Jordan argued that Daniels would be denied effective representation if the trial was forced to proceed as scheduled. At the hearing on the motion for continuance, however, Daniels refused to waive time and the motion was denied.

[9] According to Keller, he had done little preparation on the case because he believed "that eventually the Public Defender would have to declare what [he] thought was an obvious conflict of interest in Mr. Daniels's case."

[10] Nor could attorney Roth be of much assistance to Jordan and Small. By the time the two were appointed, Roth had been designated as a prosecution

confidence in his defense counsel's motives resulted in a total lack of communication between them. Thus, Daniels proceeded to trial with defense counsel he did not trust and who lacked the time and experience to adequately try a capital murder case.

IV. Trial and Conviction

The State of California tried Daniels for first degree murder, alleging that he acted with premeditation and malice aforethought in killing officers Doty and Trust in retaliation for the injuries he received after the bank robbery. The evidence against Daniels included the testimony of Ross, who was in the house at the time of the murders. In addition, Ross, Butler, and Smith all testified that Daniels admitted to them that he had shot the officers. This testimony was supported by the ballistics evidence from the crime scene.

Despite the overwhelming evidence of Daniels's guilt, Daniels's counsel presented a defense that Daniels was not the perpetrator of the officers' murders. Although he appeared willing to testify in his own behalf—and despite the fact that his counsel believed that the only valid defense strategy was for Daniels to testify—Daniels did not testify.[11] Instead, Jordan attempted to paint Daniels as having a generally positive attitude toward the police even after the 1980 shooting. Jordan also attempted to establish that the gunshot injury to Daniels's hand would have made it difficult for him to have committed the murders.

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witness and feared that the trial court might rule that any disclosure of the content of Daniels's communications to Jordan and Small might place the communication outside the attorney-client privilege.

[11] Indeed, Jordan himself believed there was no credible defense to Daniels's guilt and that the only valid defense strategy was for Daniels to testify.

After closing arguments, the jury deliberated for just a few hours before delivering a verdict of guilty on two counts of first degree murder with special circumstances for (1) multiple murder; (2) murder committed to avoid lawful arrest; and (3) murder of police officers engaged in the performance of their duties. The verdicts were returned on December 1, 1983. The defense team had eleven days to prepare for the penalty phase.

V. Penalty Phase

The penalty phase proceedings began on December 12, 1983. One month earlier, recognizing that his time had been devoted exclusively to guilt phase preparation, Jordan had moved for a continuance on the penalty phase. In that motion, Jordan argued that he lacked sufficient time to adequately prepare for the penalty phase. According to Jordan, "most, if not all," of the witnesses he intended to use for testimony on mitigation had yet to be interviewed, and most of these witnesses resided out of state. Jordan also filed a motion to substitute Roth as counsel for the penalty phase. Both motions were denied.

During the penalty phase, Jordan relied on the testimony of psychologist Robert Banks. Jordan did not retain Banks for a psychological diagnosis, but rather for the limited purpose of conducting a preliminary screening of Daniels, to get "impressions" of Daniels in order to determine whether further evaluation was necessary. After his preliminary screening of Daniels suggested the presence of an organic brain disease, Banks attempted to secure the assistance of neuropsychology experts for further evaluations. However, he was unsuccessful, and defense counsel never sought further evaluation. Indeed, because Jordan did not request additional funds for mental health expert testimony until one week before the penalty phase

was to begin, no further evaluations were conducted prior to the penalty phase.[12]

Further, defense counsel failed to follow up on earlier psychiatric evaluations of Daniels. For instance, after the 1980 shooting rendered him a paraplegic, Daniels received treatment from psychiatrist Robert Philips. In November 1982, while he still represented Daniels, public defender Keller had corresponded with Philips. Even though Philips had established a good rapport with Daniels, Jordan did not attempt to obtain Philips's assistance and instead sought the assistance of another psychiatrist, Dr. Anthony Oliver. Daniels refused to speak or otherwise cooperate with Oliver or to provide "any information pertinent to [his] purpose." Rather, Daniels stated that he believed his conversation with Oliver was being monitored. To Oliver, this belief, paired with Daniels's distrust of his counsel and the legal process, indicated a degree of paranoid ideation.[13] Jordan did not follow up on Oliver's assessment, however. Consequently, despite his limited evaluation, Banks was the only mental health practitioner to testify on Daniels's behalf.

Banks's testimony was problematic for several reasons. Banks was not a forensic psychologist and lacked the credentials to testify in a death penalty case. Banks's only

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[12] Incomprehensibly, this funding request was eventually granted, but not until one month after Daniels was sentenced to death.

[13] Oliver also stated that he did not find any evidence of psychopathology to indicate a mental impairment that would bear on the issue of criminal responsibility. The State has latched onto this statement to repeatedly contend that it establishes that Daniels suffered from no mental illness. What the State repeatedly neglects to mention, however, is that Oliver did not speak with Daniels, who refused to cooperate in the attempted examination. Consequently, Oliver was unable to administer any diagnostic tests or otherwise evaluate Daniels's mental state. In short, Oliver's letter does not come close to being as determinative as the State would have this court believe.

experience as an expert witness was in evaluating children for family court child custody cases; he had never before testified in a death penalty case. In addition, Banks intentionally limited his evaluation of Daniels: (1) Banks confined his interview of Daniels to the time period *before* the 1980 robbery; (2) Banks's evaluation did not include any consideration of the events surrounding the murders for which Daniels was charged; and (3) Banks limited his evaluation to just a few screening tests. Moreover, during his testimony, Banks admitted that he had not fully reviewed even the scant psychological background materials provided to him by Jordan.

Based on his limited screening, Banks testified that Daniels was likely schizophrenic and showed signs of brain damage. Dr. Sherry Skidmore, who later reviewed Banks's evaluation, found that he was conservative in his conclusions. Nevertheless, because Banks had so circumscribed his examination of Daniels, the State was able to effectively discredit his results on cross-examination by emphasizing Banks's lack of expertise, lack of preparation, and limited evaluation. In addition, during his testimony, Banks himself questioned whether the term "sociopath" applied to Daniels, opening this topic for discussion by the State's rebuttal witness.

In rebuttal, the State's expert, Dr. Rex Julian Beaber, attacked Banks's testimony, particularly the validity of certain tests Banks relied on in evaluating Daniels. In contrast to Banks, Beaber was an experienced and nationally certified, forensic psychologist. According to Beaber, the limited information relied on by Banks warranted the conclusion that Daniels was

a sociopath.[14] Beaber went on to define "sociopath" as someone "without a conscience."

Jordan did not present any witness in sur-rebuttal. Thus, the jury heard no psychological testimony to mitigate or explain Daniels's behavior other than the testimony of an unqualified and incompetent psychologist. Instead, Beaber's testimony that Daniels was a violent sociopath was the final impression the jury had of Daniels before it began its deliberations on his sentence. After two days of deliberations, the jury returned a verdict imposing death.

VI. Federal Habeas Petition & Evidentiary Hearing

The California Supreme Court upheld Daniels's conviction and sentence on direct appeal. *Daniels*, 802 P.2d at 950. His state habeas petition was denied on July 22, 1992. Daniels filed a federal habeas petition on October 22, 1992. On July 1, 1999, the district court granted Daniels's April 30, 1993 motion for an evidentiary hearing on Daniels's claims of ineffective assistance of counsel.

For the evidentiary hearing, Dr. Richard Dudley, Jr., a licensed psychiatrist, performed a comprehensive evaluation of Daniels, including a review of Daniels's records, witness interviews, and a psychiatric examination of Daniels.[15] In his

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[14] As discussed below, when the district court held an evidentiary hearing on Daniels's habeas petition, the court appointed its own expert psychologist. This expert testified that neither of the psychologists who testified at the penalty phase had sufficient information on Daniels to make a reliable diagnosis.

[15] Dudley evaluated Daniels using the diagnostic criteria'-in use between May 1982 and March 1984, the period between Daniels's arrest and conviction. At that time, the Diagnostic and Statistical Manual of Mental Disorders III ("DSM-III") was in use and Dudley relied on that manual for his diagnosis.

evaluation, Dudley examined Daniels's family, developmental, and criminal history as well as his medical and psychiatric records, including a series of impressions and opinions by prison psychiatrists, psychologists, and social workers. Dudley also reviewed the medical records relating to Daniels's injuries following the 1980 shooting, Daniels's own writings prepared during his capital trial, and transcripts of Banks's and Beaber's testimony.

Dudley's review of Daniels's records disclosed that, at various times prior to 1980, Daniels was described as exhibiting signs of mental disorders. Based on Daniels's history and psychiatric evaluations, Dudley concluded that Daniels suffered from an "underlying mixed personality disorder" at least since the time he became an adult.[16] To Dudley, the 1980 shooting was significant to any evaluation of Daniels's mental state before and after the 1982 shooting of officers Doty and Trust.

Dudley believed there was a clear deterioration of Daniels's mental state after 1980. A major factor in this deterioration was the 1980 shooting, from which Daniels suffered a profound physical trauma and severe damage to his psychological foundation. Even before this shooting, there was evidence that Daniels thought the police were "targeting" him. After the shooting, Daniels began to exhibit signs of a posttraumatic stress disorder. In Dudley's opinion, Daniels's feelings of persecution toward his defense counsel and the court system rose to the level of a paranoid delusion.[17] The delusions that

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[16] In large part, Dudley confirmed an earlier diagnosis that Daniels suffered from organic brain damage. However, Dudley indicated that further testing was needed to determine if it was the result of the shooting. Without this testing, Dudley concluded there was insufficient evidence to confirm or eliminate a diagnosis of brain damage and, thus, Dudley did not consider brain damage as a factor in his opinion.

[17] "Paranoid delusion" is the term used from 1982 to 1984. Today, this mental disorder is referred to as a "delusional disorder." A delusion

characterized Daniels's paranoid disorder affected his behavior and prevented him from cooperating with his counsel. Dudley reasoned that it was this disorder that caused Daniels to believe his own defense counsel were part of a conspiracy to kill him.

Most important, Dudley, concluded that it was likely that at the time of the instant offense, Daniels's paranoia had already developed and was exacerbated by the post-traumatic stress disorder resulting from the 1980 shooting, the 1981 mistaken arrest, and by Daniels's occasional cocaine use in the period before the shootings. Ultimately, Dudley reached the opinion that Daniels had a mental disorder both before and during May 1982. Thus, at significant times prior to the shootings, as well as during the shooting and later during the trial, Daniels suffered a paranoid disorder. Daniels's symptoms of this paranoid disorder persisted at least until the time of his interview with Dudley. In Dudley's opinion, if competent psychiatrists had had access in 1982 to the information available to him in this review, they would have reached the same conclusions as he did.

Also considered at the evidentiary hearing was a declaration filed by psychiatrist Fred Rothenberg, who was retained by Daniels's post-conviction counsel to provide psychiatric evaluations of Daniels. As part of his evaluation, Rothenberg reviewed portions of Daniels's medical records, including prison medical records, and medical testimony from his capital trial. Rothenberg also performed a psychiatric evaluation of Daniels and administered certain psychological tests.

"involves a '. . . false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constituted incontrovertible and obvious proof or evidence to the contrary.' " Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders app. C (rev. 4th ed. 2002) ("DSM-IV").

Based on his testing and record review, Rothenberg concluded that Daniels suffers from organic brain damage related to anoxia.[18] Of particular relevance to this diagnosis was the 1980 shooting, from which Daniels suffered significant blood loss and shock. According to Rothenberg, insufficient blood pressure, and the resulting reduction of blood flow to the brain, can result in anoxia and brain damage.[19] This diagnosis was also indicated from previous testing that showed brain damage and from the results of the psychological testing administered by Rothenberg. It was further confirmed by Daniels's behavior, history, and the results of other cognitive testing that revealed Daniels's difficulty with coordination and attention.[20]

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[18] Anoxia, also known as cerebral hypoxia, refers to a condition in which there is a decrease of oxygen supply to the brain even though there is adequate blood flow. This condition can result from drowning, strangling, choking, suffocation, cardiac arrest, head trauma, carbon monoxide poisoning, and complications of general anesthesia. Mild anoxia can result in "inattentiveness, poor judgment, memory loss, and a decrease in motor coordination. Brain cells are extremely sensitive to oxygen deprivation and can begin to die within five minutes after oxygen supply has been cut off. When [anoxia] lasts for longer periods of time, it can cause coma, seizures, and even brain death." Recovery depends on the duration of the oxygen deprivation and the amount of resulting brain damage. The longer the episode, the lower the chances of a full or meaningful recovery. *See* National Institute of Neurological Disorders and Stroke, Cerebral Hypoxia Information Page, *at* http://www.ninds.nih.gov/health_and_medical/disorders/anoxia_doc.htm.

[19] Rothenberg also suggested further testing to measure the extent of Daniels's impairment. The district court denied this request for ancillary funds.

[20] In addition to the 1980 shooting, Daniels had suffered other head injuries, including a severe motor vehicle accident. Each of these injuries rendered Daniels unconscious and, according to Rothenberg, created a high likelihood of organic brain damage.

Rothenberg's preliminary psychiatric diagnosis was that Daniels suffered from Organic Personality Disorder and Dementia secondary to brain damage. This condition rendered Daniels "unable to assist counsel [at certain times] in a rational manner because of a combination of physical, emotional and psychological factors." According to Rothenberg, Daniels's brain damage existed at least since the 1980 shooting. The resulting personality disorder was also characteristic of Daniels prior to the 1982 shooting of officers Doty and Trust. In support of this contention, Rothenberg pointed to a prison file containing results of tests earlier administered to Daniels, including a Bender Gestalft[21] test from 1984 that evidenced brain damage.

Finally, the district court retained Dr. John Stalberg as its case expert to review Daniels's files. Stalberg testified that the information made available to Banks and Beaber at the time of Daniels's trial was inadequate. Consequently, neither Banks nor Beaber had sufficient information to make a reliable or informed diagnosis. Although Stalberg disagreed with Rothenberg's conclusion that Daniels suffered organic brain damage, he believed that Oliver's findings and opinion, expressed in 1983, were "disturbing," and suggested that Daniels's mistrust of counsel indicated a paranoia that would, or should, have raised significant questions about Daniels's competency bearing on possible defenses or mitigation.

After four days of hearings, the district court granted Daniels's petition in part. The district court affirmed Daniels's conviction, but ordered a new penalty phase trial. The district court concluded that the lack of communication between Daniels and his counsel resulted in the constructive denial of Daniels's Sixth Amendment right to counsel at the penalty

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[21] The Bender Visual Motor Gestalt ("Bender Gestalt") Test is used to measure the cognitive and developmental functioning of children and adults.

phase. The court also found that Daniels was prejudiced by his counsel's ineffective penalty phase representation such that he was denied his right to effective assistance of counsel. Finally, the court held that Daniels's due process rights were violated by the cumulative effect of several trial court errors, in particular the trial court's denial of Daniels's motion to change venue and its failure to instruct the jury that it could consider overlapping special circumstances as only a single factor in aggravation. Accordingly, the district court vacated Daniels's death sentence. Unless the State opted to grant Daniels a new penalty trial within 120 days of the entry of judgment, the court ordered that Daniels be re-sentenced to life in prison without the possibility of parole.[22] Both Daniels and the State appeal.

In its appeal, the State argues that the district court erred in granting Daniels penalty phase relief. Specifically, the State appeals the district court's findings (1) that Daniels was constructively denied counsel at the penalty phase of his trial; (2) that Daniels was prejudiced by ineffective penalty phase representation; and (3) that Daniels's due process rights were denied at the penalty phase by the trial court (a) denying Daniels's motion to change venue and (b) failing to instruct the jury that it could consider overlapping special circumstances as only a single factor in aggravation. The State further argues that the district court correctly denied Daniels's petition as to the guilt phase of his trial.

Daniels appeals the district court's denial of guilt phase relief. Specifically, Daniels argues that, for the same reasons articulated by the district court as to the penalty phase, he was also (1) constructively denied counsel and (2) prejudiced by his counsel's ineffective assistance at the guilt phase of his trial. Daniels further argues that the district court correctly granted

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[22] We earlier denied the State's motion for a stay of the district court's judgment pending appeal.

him penalty phase relief on these grounds. In addition, he argues that the district court properly concluded that his due process rights were violated at the penalty phase because the state court gave an erroneous jury instruction and rejected his change of venue motion.[23]

STANDARD OF REVIEW

We review the district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition de novo. *Alcala* v. *Woodfern*, 334 F.3d 862, 868 (9th Cir. 2003). Findings of fact made by the district court are reviewed for clear error. *Id.* Habeas relief should be granted where the alleged errors "had substantial and injurious effect or influence in determining the jury's verdict." *Bricht v. Abraham son*, 507 U.S. 619, 637 (1993). A state court's conclusion that a constitutional error was harmless is reviewed de novo.[24] *Ghent v. Woodfern*,279 F.3d 1121, 1126 (9th Cir. 2002).

DISCUSSION

I. Sixth Amendment Right to Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

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[23] Daniels does not, however, argue that the denial of his venue motion violated his due process rights at the guilt phase.

[24] Because his habeas petition was filed on October 22, 1992, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") standards of review do not apply to Daniels's petition. *See Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001) (noting that pre-AEDPA standards of review apply when petition filed before effective date); *Smith v. Robbins*, 528 U.S. 259, 268 n.3 (2000) (noting AEDPA does not apply to petitions filed before its effective date of April 24, 1996).

This right has two components: (1) the right to counsel's undivided loyalty, *Wood v. Georgia*, 450 U.S. 261, 272 (1981), and (2) the right to reasonably competent counsel, *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). Daniels's habeas petition implicates both of these components.

A. Constructive Denial of Counsel

[1] A defendant has a Sixth Amendment right to conflict free representation. *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998). Not every conflict between a defendant and counsel, however, implicates the Sixth Amendment. *See Schell* v. *Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000). As the Supreme Court has explained, the right to counsel does not guarantee "a right to counsel with whom the accused has a 'meaningful attorney-client relationship.'" *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983). Nevertheless, where a court "compel[s] one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in [an] irreconcilable conflict [it] deprive[s] him of the effective assistance of any counsel whatsoever." *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970). Thus, a reviewing court must assess the nature and extent of the conflict and whether that conflict deprived the defendant of representation guaranteed by the Sixth Amendment. *Schell*, 218 F.3d at 1027.

Here, the conflict was not one created by Daniels or by his counsel. Rather, it was created by a series of events that occurred before the appointment of Jordan and Small, in particular, certain decisions of the state trial court regarding the selection and removal of counsel. As detailed above, these decisions included the trial court's (1) refusal to recognize the clear conflict between Daniels and the Public Defender's Office until more than nine months had elapsed; (2) removal of Roth as counsel despite Daniels's willingness to waive any conflict and to stipulate to the facts to which Roth would presumably testify; and (3) appointment of a former prosecutor, with no

criminal defense experience and only three months to prepare, to represent Daniels. Given this history, it is understandable that Daniels would mistrust the judicial paranoid delusions-including his belief that his defense counsel was conspiring with the prosecution to kill him-it is easy to see why this mistrust led to a complete breakdown of communication.

The Supreme Court has repeatedly held that a defendant's Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his or her counsel during key trial preparation times. *See Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.") (citations omitted); *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was. . . prevented from assisting the accused during a critical stage of the proceeding."); *Geders v. United States*, 425 U.S. 80, 91 (1976) (holding that trial judge's order that counsel could not communicate with defendant during overnight recess in the middle of trial violated defendant's Sixth Amendment right).

We have applied the constructive denial of counsel doctrine to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel. *See United States v. Nguyen*, 262 F.3d 998, 1003-04 (9th Cir. 2001); *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 778-79 (9th Cir. 2001). The test for determining whether the trial judge should have granted a substitution motion is the same as the test for determining whether an irreconcilable conflict existed. *United States v. Moore*, 159 F.3d 1154, 1159 n.3 (9th Cir. 1998). The court must consider: (1) the extent of the conflict; (2) whether the trial judge made an

appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel. *Id.* at 1158-59.

1. The Extent of the Conflict

[2] Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. *Adelzo-Gonzalez*, 268 F.3d at 779. This is true even where the breakdown is a result of the defendant's refusal to speak to counsel, unless the defendant's refusal to cooperate demonstrates "unreasonable contumacy." *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970); *see also Nguyen*, 262 F.3d at 1003-04 (quoting and applying *Brown); Adelzo-Gonzalez*, 268 F.3d at 780 (same).

"Even if [trial] counsel is competent, a serious breakdown in communications can result in an inadequate defense." *Nguyen*, 262 F.3d at 1003 (citing *United States v. Musa*, 220 F.3d 1096, 11 02 (9th Cir. 2000)); *see also United States v. D'Amore*, 56 F.3d 1202, 1206 (9th Cir. 1995) ("[A] court may not deny a substitution motion simply because [it] thinks current counsel's representation is adequate."), *overruled on other grounds by United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999).

[3] Daniels's relationship with his trial attorneys is similar to that in *Nguyen*, where we held that Nguyen was constructively denied counsel. *Nguyen*, 262 F.3d at 1004 ("There is no question in this case that there was a complete breakdown in the attorney-client relationship. By the time of trial, the defense attorney had acknowledged to the Court that Nguyen 'just won't talk to me anymore.' In light of the conflict, Nguyen could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was' left to fend for himself.'"). Similarly, in *Brown*, we found that the defendant was constructively denied

his right to counsel where he "was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate." *Brown*, 424 F.2d at 1169. In that case, the defendant and his public defender became embroiled in an irreconcilable conflict. *Id.* at 1169. Brown's repeated motions for substitution of counsel were all denied by the state trial court, which did not attempt to determine the extent of Brown's dissatisfaction or to appoint alternative counsel. *Id.* As a consequence, Brown's lawyer was unable to prepare an adequate defense. At trial, Brown's attorney offered only a perfunctory defense, and Brown did not testify in his own behalf. *Id.* Here, like *Nguyen* and *Brown*, there was a complete breakdown in the communication between Daniels and his trial counsel. Daniels was not simply being obstreperous when he refused to communicate with counsel. His distrust was understandable given that: (1) the court refused to acknowledge the public defender's conflict until close to the trial; (2) the court refused to appoint Roth as his counsel even though Daniels continued to request him and obviously trusted him; (3) after all the substitutions for which Daniels was not responsible, and with three months remaining before trial, the court appointed an inexperienced former prosecutor as lead counsel; and (4) once appointed, trial counsel did not conduct reasonable preparation-they did not seek Roth's help, nor did they obtain Daniels's medical records or any information about how he became paraplegic and the extremely poor medical treatment he received after he was erroneously arrested in 1981.

Daniels's paranoia led him particularly to distrust a lawyer who had spent most of his career as a prosecutor and whom he thought was appointed to see that he was convicted and sentenced to death. Although Daniels's belief may have been unwarranted, the court still had an obligation to try to provide counsel that Daniels would trust. Cf. *Nguyen*, 262 F.3d at 1003 (holding that trial court should have been sensitive to cultural

and linguistic barriers to communication in considering motion to substitute counsel); *Brown*, 424 F.2d at 1170.

For the guilt phase, the complete breakdown in communication meant that Jordan and Small were unable to discuss possible defense strategies with Daniels or to discover and assess basic information about the case from his perspective so that they might pursue that strategy. As a consequence, the jury never heard Daniels testify to his version of the events. Instead, defense counsel presented the implausible defense that Daniels was not the perpetrator of the murders.

The conflict between Daniels and Jordan had an even more profound effect on the penalty phase. Jordan believed that Daniels's explanation of the events from his perspective including his fear when the officers entered his room and of returning to custody-could have formed the basis of a mitigation case. But, because Daniels mistrusted him and would not communicate with him, Jordan was hampered in his ability to develop a case of mitigation for the penalty phase through Daniels's own words. In addition, because of his paranoia, Daniels refused to cooperate with psychologist Oliver, believing their conversation was being monitored. Had Daniels cooperated, Oliver might have been able to make an evaluation that exposed Daniels's mental illness for use in mitigation. Or, Daniels may have revealed a source of information leading to mitigating evidence.

The district court's findings in this case, made after an evidentiary hearing that included testimony from Daniels's trial counsel, reflect the extent of the conflict. According to the court:

> The lack of communication between Daniels and his counsel was so profound that it rendered Counsel completely unable to discover the basic information necessary to give fair consideration to how best to defend

> Daniels at the guilt phase. . . or to develop any meaningful mitigation at the penalty phase.
>
> No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel was violated by reason of a breakdown of communications between client and counsel has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself. . . . In this case, communications did not "break down," but rather never existed. Daniels'[s] refusal to communicate was the understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings.

[4] This "serious conflict" between Daniels and his trial counsel gives rise to a presumption of prejudice. *Peny v. Leeke*, 488 U.S. 272, 278-79 (1989); *Schell*, 218 F.3d at 1027 ("In the event that the trial court determines that a serious conflict did exist that resulted in the constructive denial of assistance of counsel, no further showing of prejudice is required; and Schell's trial shall be presumed to have been unfair.") As this district court stated, "Daniels'[s] case represents the paradigm case as to why prejudice must be presumed. . . . It is in a case presenting circumstances like these -where the breakdown in communication impeded counsel's ability to provide assistance as to the most basic considerations for a defense-that prejudice must be presumed because it is so likely to have occurred."[25]

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[25] The district court goes on to conclude that because Daniels did not show that other counsel was available to represent Daniels at his trial, his Sixth Amendment right to counsel was not violated as to the guilt phase of the trial. Not only is a defendant not required to establish the availability of alternative counsel, imposing such a requirement would conflict with the presumption of prejudice that is required by Ninth Circuit and Supreme Court precedent. *See Perry*, 488 U.S. at 278-79 ("Actual or constructive denial of the assistance of counsel altogether, is not subject to the kind of

The extent of Daniels's conflict with trial counsel was serious and gives rise to a presumption that Daniels was prejudiced by his inability to communicate with counsel.

2. *Trial Court's Duty to Inquire*

When a trial court is informed of a conflict between trial counsel and a defendant, "the trial court should question the attorney or defendant 'privately and in depth,' and examine available witnesses. . . ." *Nguyen*, 262 F.3d at 1004 (quoting *Moore*, 159 F.3d at 1160). A conflict inquiry is adequate if it "ease[s] the defendant's dissatisfaction, distrust, and concern" and "provide[s] a 'sufficient basis for reaching an informed decision.' " *Adelzo-Gonzalez*, 268 F.3d at 777 (citations omitted).

Here, the state trial court never questioned Daniels or his attorneys individually after Daniels informed the court of the conflict, and did not call any witnesses on the issue. When Daniels submitted a letter detailing some of his concerns before trial, the trial court disregarded Daniels's concerns. For example, Daniels told the trial court that "there is things in this case that I feel like would be vital that the Court's be made aware of where the attorney of record do not know and have no knowledge of," As a result, Daniels wanted to question witnesses himself or have another attorney question them. Although Daniels had made it clear that he did not trust his attorneys and could not communicate with them, the trial court did not conduct any inquiry into the conflict between Daniels and his counsel. Instead, the court instructed Daniels that he should discuss the matter with these same attorneys.

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prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective," (internal citation and quotations omitted)); *Schell*, 218 F.3d at 1027.

3. *Timeliness of Motion*

"In evaluating the timeliness of [a] motion for substitution of counsel, we balance 'the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice.'" *Moore*, 159 F.3d at 1161 (quoting *D'Amore*, 56 F.3d at 1206). Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay. *Adelzo-Gonzalez*, 268 F.3d at 780. This is particularly true where the trial Court has reason to know of the conflict months before the trial but does not inquire into the conflict. *Id.*

Here, Daniels informed the trial court three months before the trial that he did not trust his appointed counsel and that trial counsel could not properly represent him. Daniels again informed the trial court of the conflict and requested substitution in a letter dated September 6, 1983, before opening statements in the guilt phase. Daniels's motion was timely under *Adelzo-Gonzalez*. *See* 268 F.3d at 780.

[5] Because of a conflict not of their making, Daniels and his counsel, Jordan and Small, were impeded in their exchange of information and advice. As the district court concluded, "[t]he lack of communication between Daniels and his counsel was so profound that it rendered counsel completely unable to discover the basic information necessary" to defend Daniels. Consequently, Jordan and Small were "understandably deprived of the power to present any adequate defense in [Daniels's] behalf." *See Brown*, 424 F.2d at 1169. The impact of this conflict infected counsel's representation of Daniels at both the guilt and penalty phases of Daniels's trial. Ultimately, this meant that Daniels was constructively denied his right to counsel in violation of the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984) (noting that defendant "is entitled to be assisted by an. attorney, whether retained or

appointed, who plays the role necessary to ensure that the trial is fair"); *see also Brown*, 424 F.2d at 1170.

B. Ineffective Assistance of Counsel

[6] To establish a claim for constitutionally ineffective assistance of counsel, Daniels must establish that (1) his counsel's actions were outside the range of professional conduct, and (2) that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 686. In considering whether Daniels received the reasonably effective assistance to which he was entitled, we must determine whether counsel's representation "fell below an objective standard of reasonableness." *Id.* at 686 & 688 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). To determine whether counsel's errors prejudiced the outcome of the trial, we must compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately. *Bonin* v. *Calderon*, 59 F.3d 815, 834 (9th Cir. 1995).

1. Counsel's Representation

a. Failure to Resolve Communication Conflict

A major impediment to Jordan and Small's representation of Daniels was Daniels's mistrust of his counsel and the resulting lack of attorney-client communication. This conflict meant that Jordan was unable to effectively communicate with his client Daniels and thus, was deprived of a valuable source of information in preparing for his defense. Ultimately, a complete breakdown in communication with their client Daniels rendered Jordan and Small's assistance ineffective. *See Frazer v. United States*, 18 F.3d 778, 782 (9th Cir. 1994) (noting that

Strickland's performance prong "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice"). This is particularly true given Jordan's ineffective efforts to overcome the impasse.

The record reveals that although Jordan was aware of the effect this communication block would have on his representation of Daniels, he did little to overcome it. As Jordan conceded, the circumstances and events surrounding his representation of Daniels—including the lack of preparation on the case by the Public Defender's Office, Daniels's lack of confidence in Jordan and Small, and attorney Roth's inability to disclose information—deprived him of information that would normally be available to defense counsel.

Nevertheless, Jordan did not apprise the district court of the extent of the communication problem with his client. In addition, even though Jordan believed Daniels's best hope was to testify and explain what had occurred and why, he did not press Daniels to testify . Nor did he explain to Daniels that his testimony was critical to his defense—indeed, that it was the only valid defense strategy. Moreover, Jordan failed to explain to Daniels how his testimony during the guilt phase would benefit his penalty phase presentation. Having Daniels describe his fears and paranoia to the jury would provide context to the psychological or other mitigating evidence offered at the penalty phase.

Even more puzzling is Jordan's failure to contact attorney Roth for assistance in overcoming this problem, despite knowing that Daniels trusted and confided in Roth. Roth later testified that he had refrained from speaking with Jordan after Roth was designated a prosecution witness to avoid learning any new information from Jordan that he might be forced to reveal to the prosecution. However, Roth's concern should not have kept Jordan from seeking information *from* Roth, as that would not have necessitated Jordan revealing any attorney-client

privileged information that Roth did not already know. In addition, Jordan could have sought Roth's advice or assistance in securing Daniels's trust.

[7] Jordan, however, took no steps to obtain Roth's assistance in communicating with Daniels.[26] Instead, it appears that either Jordan or Small told Roth to "keep [his] hands off and let's see if we can handle this to the best of our ability." Moreover, Jordan did not attempt to use Roth during the penalty phase even though Roth was no longer a prosecution witness and the trial court had expressly suggested that Jordan contact Roth. As the district court concluded, "[i]n light of [Jordan's] admitted knowledge that Daniels'[s] testimony was critical to his defense and his ongoing inability to communicate with Daniels, his failure to use Roth in any way to overcome the communication failure, particularly by the time of the penalty phase when any threat from Roth's designation as a witness had been lifted, constituted deficient performance."

b. Failure to Investigate Mental Health Defenses or Mitigation Evidence

More troubling is counsel's failure to conduct a thorough investigation into Daniels's mental illness and possible brain damage. Even though Daniels refused to speak to his counsel, Jordan still had an independent duty to investigate the facts of his case and possible mitigation evidence. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client."); *see also Dirt v. Montgomery*, 709 F.2d 690, 701 (7th

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[26] Jordan's only explanation was that he did not contact Roth because he believed that if Roth had any useful information, he would have contacted Jordan. This explanation, however, ignores the fact that it was Jordan who owed a duty of effective representation to Daniels, not Roth.

Cir. 1983) ("Essential to effective representation. . . is the independent duty to investigate and prepare."); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) ("At the heart of effective representation is the independent duty to investigate and prepare."); 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.").

[8] We have found counsel "ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." *See Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (vacating judgment of district court where it was not possible to "determine if counsel's decision was a strategic one, and if so, whether the decision was a sufficiently informed one."). As we have explained, "[p]retrial investigation and preparation are the keys to effective representation of counsel. Courts have repeatedly stressed the importance of adequate consultation between attorney and client, the interviewing of important witnesses, and adequate investigation of potential defenses." *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (internal citations omitted).

In *Wiggins v. Smith*, the Supreme Court concluded that Wiggins was denied effective assistance of counsel because his trial counsel failed to conduct an investigation that would have revealed a background of sexual and physical abuse, borderline mental retardation, and troubling experiences in the foster care system. 539 U.S. 510 (2003). Wiggins's trial counsel had made a minimal investigation: they had obtained reports from the Department of Social Services, had consulted a pre-sentence investigation report, and had hired a psychologist to perform

some preliminary tests. Despite preliminary findings suggesting that Wiggins had been significantly victimized as a child, his trial counsel did not conduct any additional investigation or pursue any of these leads.

In reversing the Fourth Circuit's denial of the petition, the Court explained the focus of its inquiry this way:

> [O]ur principal concern in deciding whether [Wiggins' trial counsel] exercised 'reasonable professional judgment,' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable.

Wiggins, 539 U.S. at 522-23 (internal citation omitted). Counsel's decision not to expand their investigation beyond the preliminary reports they had access to fell below professional standards. *Id.* at 524-25. The Court found it particularly unreasonable for counsel to limit the scope of their investigation given the preliminary reports, noting that "any reasonably competent attorney" would have pursued such leads in order to make an informed choice among possible defenses. *Id.* at 525. "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. Using this standard, the *Wiggins* Court found that Wiggins's counsel had chosen to abandon their investigation at an unreasonable juncture, and thus had made a fully informed decision with respect to sentencing strategy "impossible." *Id.*

[9] Here, the record reveals that although Jordan believed Daniels may have suffered from a mental illness, he did little to investigate Daniels's mental health. Even after Dr. Banks's preliminary examination indicated a strong probability that

Daniels was schizophrenic and suffered from paranoia, trial counsel did not follow up on these important leads by seeking a comprehensive evaluation by more qualified and experienced practitioners. Given these preliminary results, counsel was expected to investigate further, rather than "abandon their investigation at an unreasonable juncture." *Wiggins*, 539 U.S. at 527-28; *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Nor did counsel follow up on the evidence of Daniels's impaired mental state that was available in reports at the time he was preparing for trial. For instance, Jordan failed to review Daniels's family and social history, which described a family history of mental illness. Although many of the documents related to Daniels's social history were not collected until after he was convicted, they were *all* available at the time of Daniels's trial. Similarly, much of Daniels's medical history was available even without Daniels's cooperation as it was held by *prison* hospitals. Had counsel reviewed these records, they would have found that, even before 1982, prison psychiatrists and psychologists considered Daniels mentally ill, at risk of experiencing a psychotic episode, and in need of psychotherapy. Daniels's medical records also contained information about prescription medications he was taking at the time of the offense. Nevertheless, counsel never investigated what, if any, potential effect these medications may have had on Daniels's mental state. Counsel's failure to review readily available records held by prison officials fell below a reasonable level of performance. *See Rompilla v. Beard*, 125 S. Ct. 2456, 2464-67 (2005) ("With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.").

Instead of seeking further mental evaluations, Daniels's counsel relied on the expert witness testimony of psychologist Banks, who was not qualified to testify in a capital case and whose testimony toyed with the idea that Daniels could be a sociopath.[27]27 *See Ainsworth v. Woodfern*, 268 F.3d 868,874-85 (9th Cir. 2001) ("[C]ounsel's ill-preparation resulted in the testimony of one defense witness. . . [whose testimony] contribut[ed] to the evidence in aggravation[,]" not mitigation) (hereinafter *Ainsworth II).* This alone constituted a significant error. *See Caro v. Woodfern*, 280 F.3d 1247, 1257 (9th Cir. 2002) ("It is significant in considering the impact of the omitted evidence on the reliability of [the defendant's] sentence, that the evidence presented by the defense as mitigation consisted primarily of lay background and character evidence. The only expert testimony presented relating to [the defendant's] mental health did not shed light on his brain damage, [but] tended, rather, to paint him as a violent psychopath."). Consequently, Daniels never received a thorough mental health examination or diagnosis, and the jury never heard any mitigating psychological explanation for Daniels's behavior.

In addition, Jordan failed to investigate or present evidence explaining Daniels's fear of returning to custody, which may have offered some explanation for his actions. Much of this fear could be based on Daniels's erroneous arrest in 1981, during which he received such inadequate medical care that he contracted urine poisoning. Evidence of this arrest and mistreatment was easily accessible in police records and in the public records of Daniels's suit filed against the County of Riverside. Counsel could have uncovered these records regardless of Daniels's cooperation.

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[27] According to Jordan, he agreed to have Banks testify only upon Daniels's insistence. This, however, does not absolve Jordan of responsibility for the disastrous results. *See Douglas v. Woodfern*, 316 F.3d 1079, 1089 (9th Cir. 2003) ("[A]lthough the client's desires are not to be ignored altogether, it may be inappropriate for counsel to acquiesce to the client's demands.").

[10] The evidence presented at the district court's evidentiary hearing suggests that if Jordan had undertaken a thorough investigation of Daniels's mental state, the jury would have heard evidence that Daniels suffered from a mental disorder at the time he committed the murders. After conducting a comprehensive review of Daniels, psychiatrist Dudley concluded that Daniels suffered a paranoid disorder at significant times prior to the shootings as well as during the shooting and later during the trial. In Dudley's opinion, a competent psychiatrist would have reached the same conclusion in 1982. Equally compelling would have been Rothenberg's testimony that Daniels suffered from brain damage, at least since the 1980 shooting. Because his counsel did not thoroughly investigate Daniels's mental history, none of this evidence was put before the jury and could not be considered in the jury's deliberations.

[11] Nothing in the record suggests that the failure to investigate was the result of a strategic decision. According to the district court, Jordan's "decision to delay his investigation and preparation for the penalty phase until it was essentially too late to permit the development and therefore introduction of meaningful mitigation is without explanation or justification."[28]

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[28] The State argues that the mental health evaluations conducted by Oliver and Philips indicate that they found no evidence of mental disease or defect. Thus, according to the State, there was nothing to indicate to defense counsel that they should pursue further testing, and their failure to do so was a strategic choice. Contrary to the State's suggestion, Jordan had every reason to doubt Oliver's conclusions, as he was aware that Oliver had not been able to examine Daniels because of Daniels's refusal to cooperate. Nothing in Oliver's letter indicates that he evaluated Daniels's medical, social, educational, or criminal records or that he conducted *any* medical or psychological testing to assess Daniels's mental state. Similarly, Philips's letters contain no evidence that he conducted any testing, evaluation procedures, or structured assessment of Daniels's mental state. The only defense psychologist to even do a limited assessment of Daniels was Banks's assessment done immediately before the penalty phase. Moreover,

Jordan did request additional funds for mental health expert testimony, but not until one week before the penalty phase was to begin. Thus, when preliminary screening suggested that Daniels was both schizophrenic and brain damaged, insufficient time and funding prevented further evaluations by neuropsychology experts. Indeed, at the evidentiary hearing, Jordan testified that he was unable to pursue further mental health evidence because of funding and time limitations. It was this lack of time and funding-and not a strategic choice that hampered Jordan's representation and ability to present mitigation evidence.

In summary, counsel (1) primarily relied on one inexperienced psychologist, who had conducted only a cursory screening of Daniels, as the principal witness in mitigation; (2) failed to follow up when this preliminary screening suggested that Daniels suffered from a mental disorder; (3) failed to follow up on evidence of paranoia; (4) failed to review Daniels's family and social history which described a family history of mental illness; (5) failed to investigate whether the medication prescribed for Daniels impacted his state of mind at the time of the shootings; and (6) failed to investigate Daniels's use of illegal substances, in particular, the combined impact of these with the prescription medications on his state of mind.

[12] More importantly, counsel's failures were not the result of strategic decision-making, but of a communication breakdown with their client, the court's refusal to grant a continuance, a shortage of time, and repeated problems with securing state funding. As *Wiggins* makes clear, without a reasonable investigation, a fully-informed decision with respect to trial strategy is "impossible." *Wiggins*, 539 U.S. at 527-28. Because the failure to conduct a reasonable investigation lacked

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according to Jordan, the decision not to conduct more testing was *not* based on trial strategy, but necessitated by a lack of time and adequate funding.

a strategic rationale, Daniels's representation was ineffective. *See Hendricks*, 974 F.2d at 1109; *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding that counsel had an obligation to conduct a thorough investigation of the defendant's background); *see also Strickland*, 466 U.S. at 691 (finding that counsel has "a duty to make reasonable investigation unnecessary").

2. Prejudice

Next we must consider whether Daniels was prejudiced by this deficient performance, that is, whether there is a reasonable probability that, but for his counsel's errors, the jury would have reached a different conclusion. *See Avila v. Galaza*, 297 F.3d 911,921 (9th Cir. 2002) (citing *Strickland*, 466 U.S. at 695). A "'reasonable probability' is a 'probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

a. Guilt Phase

It is clear in this case that Daniels shot the two officers and is guilty of some type of unlawful killing. However, as demonstrated during the evidentiary hearing, there was evidence that his mental state at the time of the offense could have been used as a defense to first degree murder.

[13] A defendant suffers prejudice when counsel's ineffective performance leads to an increased sentence for the defendant. *Glover v. United States*, 531 U.S. 198,202-05 (2001). We have repeatedly held that defense counsel in a murder trial was ineffective where there was some evidence of the defendant's mental illness in the record, but counsel failed to investigate it as a basis for a mental defense to first degree murder. *See Jennings v. Woodfern*, 290 F.3d 1006, 1010, 1014-16 (9th Cir. 2002) (holding that where "trial counsel failed adequately to investigate and present considerable evidence regarding

petitioner's psychological and family history that might have . . . defeated the jury's finding of the requisite intent for first degree murder in the guilt phase," defendant was denied effective assistance of counsel); *Seidel v. Merkle*, 146 F.3d 750, 755-56 (9th Cir. 1998) (reasoning that counsel was prejudicially ineffective for failing to conduct reasonable investigation of guilt phase mental defenses where there was evidence in record that defendant had previous psychiatric treatment in jail); *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) ("The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance."); *see also Sanders*, 21 F.3d at1456 (holding that trial counsel was deficient during guilt phase for "fail[ing] to conduct even the minimal investigation that would have enabled him to come to an informed decision about what defense to offer," and that "[d]escribing [counsel]'s conduct as 'strategic' strips that term of all substance"). This is particularly true where the defense that was presented at trial was weak or meritless. *See, e.g., Jennings*, 290 F.3d at 1016 ("[A] possible conflict between a diminished capacity and an alibi defense would not excuse counsel's failure initially to investigate the potential strengths of a 'mental defense' vis-a-vis an uncorroborated alibi defense.") (quoting *People v. Mozingo*, 671 P.2d 363, 367 (Cal. 1983)).

[14] Prison psychiatrists diagnosed Daniels as schizophrenic as early as 1965, but the only psychiatrist who spoke with Daniels before the trial did not review any of Daniels's medical records and was only able to conduct a cursory examination. There was no evidence presented at trial of Daniels's mental illness or brain damage, nor of his fear of returning to prison. Instead, counsel presented a defense that went against all the weight of evidence, i.e., that Daniels was not the perpetrator. As the district court concluded, "even in the face of his inability to communicate with Daniels, selecting such a strategy w :s

ineffectual and in fact was indefensible." *See Silva* v. *Woodfern*, 279 F.3d 825, 846 (9th Cir. 2002) ("Certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." (quoting *United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983))). More important, this defense deprived Daniels of the opportunity to challenge the prosecution's theory that he acted with premeditation and denied him two available mental health defenses that, under California law, may have reduced his conviction from first to second degree murder, thereby making him ineligible for the death penalty. *See* Cal. Penal Code §§ 190.2(a) (noting that defendant must be convicted of first degree murder to be sentenced to death).

First, evidence regarding Daniels's mental illness may have demonstrated that Daniels was incapable of forming the requisite intent to commit first degree murder. California's diminished capacity defense provides that a defendant can be legally sane at the time of the murders, but "if he was suffering from a mental illness that prevented his acting with malice aforethought or with premeditation and deliberation, he cannot be convicted of murder of the first degree."[29] *People v. Cruz*, 605 P.2d 830, 834 (Cal. 1980). If there was evidence that a mental illness prevented the defendant from "maturely and meaningfully reflect[ing] upon the gravity of his contemplated act," then the defendant would not be guilty of first degree murder despite "[s]ubstantial evidence supporting a finding of premeditation and deliberation." *Id* at 835 (quoting *People v. Wolff*, 394 P.2d 959, 975 (Cal. 1964)).

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[29] California abolished the diminished capacity defense in June 1982. However, the California Supreme Court has held that for crimes that took place before June 1982, the defense is still available, and trial counsel can be held to be ineffective if they did not pursue the defense where it was warranted. *People v. Weaver*, 29 P.3d 103, 130, 130 n.8 (Cal. 2001). Daniels killed the police officers in May 1982, and therefore the diminished capacity defense was still available to him at the time of his trial.

Here, there is evidence that Daniels suffered from severe mental illness and possible brain damage. Under the diminished capacity standard, a jury could well have found that he did not have the capacity to truly premeditate and understand the gravity of shooting at the officers who were coming to take him to prison. *See People v. Ledesma*, 729 P.2d 839, 872-73 (Cal. 1987) (holding that counsel was prejudicially ineffective for failure to investigate mental illness evidence despite expert's report stating that defendant was competent to stand trial because report raised other issues); *People v. Mozingo*, 671 P.2d 363, 367-68 (Cal. 1983) (holding trial counsel ineffective for failure to investigate diminished capacity defense despite defendant's unwillingness to cooperate where he previously had been diagnosed with schizophrenia by prison psychologist during previous incarceration); *People v. Frierson*, 599 P.2d 587, 596-97 (Cal. 1979) (holding that even though defendant was rational and appeared to be without mental abnormalities, and even though killings appeared to be deliberate, counsel was prejudicially ineffective for failing to investigate evidence that defendant was impaired on day of murders); *People v. Corona*, 145 Cal. Rptr. 894 (Ct. App. 1978) ("[T]rial counsel in gross neglect of his basic duty, failed to conduct the requisite factual and legal investigation in an effort to develop [a diminished capacity defense] and as a result of his neglect, [this] crucial defense [was] withdrawn from the case."); *In re Hwamei*, 112 Cal. Rptr. 464,469 (Ct. App. 1974) (holding that where there were some indications on record that defendant may have had mental illness, counsel was prejudicially ineffective for not investigating and pursuing diminished capacity defense, and instead presenting mistaken identity defense where facts did not support it).

Evidence of Daniels's mental illness may also have demonstrated imperfect self-defense. A defendant can be convicted of second degree rather than first degree murder if he subjectively experienced heat of passion or provocation at the time of the murder, such that it negated deliberation or

premeditation. *People v. Fitzpatrick*, 963 Cal. Rptr. 2d 808,814-15 (Ct. App. 1992). This defense applies even if the defendant's subjective belief was unreasonable. See *People v. Padilla*, 126 Cal. Rptr. 2d 889, 892-93 (Ct. App. 2002) (holding defendant entitled to argue provocation as defense to first degree murder where he killed his cellmate after hallucinating that cellmate had killed defendant's family, even though it was objectively unreasonable to believe that cellmate killed his family).

"Imperfect self-defense obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." *People v. Rios*, 2 P.3d 1066, 1074 (Cat. 2000). A defendant who killed with a subjective but unreasonable belief that he is going to be killed or seriously harmed is not guilty of first degree murder. *Id.*

Daniels may have believed that officers Doty and Trust were coming to kill or seriously harm him. This is objectively unreasonable, but there are several indications that it may be what Daniels actually thought. First, diagnoses of Daniels's mental condition support this conclusion. Oliver stated that Daniels exhibited a degree of paranoid ideation. Dudley later assessed that Daniels had a delusional disorder, and that Daniels remained delusional for "some time" surrounding the murders and the trial. Second, Daniels had previously been shot by the police nine times, arrested erroneously, betrayed by his own attorney, and subjected to insufficient and harmful medical treatment in jail that resulted in urine poisoning. Presenting evidence that Daniels was paranoid delusional and feared for his life or safety when the officers came to arrest him could have created a reasonable doubt in the minds of the jurors as to whether Daniels premeditated or deliberated these killings.

[15] Because he did not overcome the communication failure, Jordan failed to learn Daniels's version of the shooting and failed to advise Daniels regarding his possible testimony.

Exacerbating this, Jordan also failed to adequately investigate Daniels's mental health and background. Because of counsel's deficient performance, Daniels was denied the opportunity to rebut the State's theory that he acted with premeditation and malice in shooting officers Doty and Trust, opening the possibility of a verdict on less than first degree murder.

b. Penalty Phase

[16] In the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1998). This is necessary because "[t]he determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, to weigh the worth of one's life against his culpability." *Id.* (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995)).

Here, Jordan's failure to overcome the communication problems and failure to investigate meant that the jury did not have before it all the possible evidence of mitigation when it deliberated Daniels's sentence. If he had done more to overcome the communication problem, Jordan may have prevailed upon Daniels to testify regarding his fear of returning to custody. In addition, post-conviction evaluations of Daniels revealed that he likely suffered from brain damage or a mental disorder at the time of the murders of Doty and Trust. If his counsel had been able to communicate with him, such evidence may have come to light earlier and been available to the jury in its deliberations.

Moreover, Jordan made no reasonable attempt to work around Daniels's refusal to speak with him. Even if Daniels had never spoken with his counsel, possible mitigating evidence was

still available to Jordan, if he had undertaken an independent investigation. For instance, a review of Daniels's prison medical records would have revealed that prison psychiatrists and psychologists considered Daniels mentally ill and in need of psychotherapy. A review of Daniels's social history would have shown that Daniels's family had a history of mental illness. Finally, the records of Daniels's wrongful arrest in 1981, including the records of his suit for damages, contained information about the effects of that mistreatment, which may have been used to explain his fear of returning to custody. Jordan's failure to investigate and present this evidence deprived the jury of possible mitigating evidence that did not depend on Daniels's cooperation or communication.

The jury deliberated for two days before returning a verdict of death. This suggests that the jury may have been influenced by mitigation evidence had it been offered. Instead, the only mitigating evidence presented was the testimony of Banks, who was woefully unprepared and who suggested Daniels may be a sociopath. This alone is sufficient for a finding of prejudice. *See Caro v. Woodfern*, 280 F.3d at 1257.

[17] In addition to a deficient penalty phase representation, Daniels was likely prejudiced by Jordan's guilt phase defense that claimed Daniels was not the shooter. As a result, Daniels faced a jury that could only be profoundly annoyed by this ludicrous defense in the face of overwhelming evidence of culpability. Thus, Daniels appeared before the sentencing jury as a man charged with murder to evade arrest, implausibly arguing that he was not the shooter to evade justice. The combination of counsel's guilt and penalty phase deficiencies, including their failure to investigate their client's mental health and failure to overcome a complete communication failure, combined to deny Daniels effective representation and prejudiced the outcome of his penalty phase trial. *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) ("[P]rejudice may result from the cumulative impact of multiple deficiencies.").

While the trial court's refusal to grant a continuance hampered Daniels's penalty phase presentation, Jordan's failure to investigate, to seek funding for mental health expert testimony until a week before the penalty phase began, or to otherwise prepare for this stage of the trial, clearly prejudiced Daniels. As a consequence, the jury considering Daniels's sentence was never exposed to meaningful mitigation evidence that may have meant the difference between a life or death sentence.

II. Due Process

A. Change of Venue

In light of the extensive pretrial publicity surrounding the murders of the two police officers, Daniels's defense counsel moved for a change of venue and for funds to conduct a community survey to demonstrate the impact of this publicity on the community. In denying the motions, the trial court took the position that whether an impartial jury could be empaneled would be determined by the outcome of the voir dire process. Daniels twice renewed the motion, once during voir dire and again after voir dire. The trial court denied each of the motions.

[18] "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citing *In re Oliver*, 333 U.S. 257 (1948)). Because a criminal defendant has the right to an impartial jury, a court must grant a motion to change venue "if prejudicial pretrial publicity makes it impossible to seat an impartial jury." *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998), *as amended*, 152 F.3d 1223 (citations and internal quotations omitted) ("*Ainsworth I*"). When "sitting in habeas corpus [the duty of the federal court] is to make an independent review of the record to determine whether there was such a degree of prejudice against the petitioner that a fair

trial was impossible." *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir. 1988) (quoting *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir. 1984)). Thus, the reviewing federal court must conduct an independent review of news reports about the case. *Id.*

Here, the district court was unable to make an independent review of the pre-trial publicity because the news coverage was not included in the record. It is also not included in the appellate record before us. Like the district court, we rely on the findings of the California Supreme Court regarding publicity.

[19] To support a change of venue motion, Daniels must demonstrate either actual or presumed prejudice. *Id.* To demonstrate actual prejudice, Daniels must show that "the jurors demonstrated actual partiality or hostility that could not be laid aside." *Id.* at 1363. Here, Daniels concedes that the record contains no findings that any jurors demonstrated partiality or prejudice that could not be laid aside. Thus, to prevail, Daniels must make a showing sufficient for a presumption of prejudice. Prejudice is presumed only in extreme instances "when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Ainsworth I*, 138 F.3d at 795.

Three factors should be considered in determining presumed prejudice: (1) whether there was a "barrage of inflammatory publicity immediately prior to trial, amounting to a huge. . . wave of public passion"; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial. *Id.* (citations omitted).

Applied here, these factors compel a finding "that the venue [wa]s saturated with prejudicial and inflammatory media publicity about the crime" sufficient for a presumption of prejudice. *See id.* at 795. The murders of Doty and Trust

generated extensive and nearly continuous publicity immediately after the shootings and again before Daniels's trial. *See Daniels*, 802 P.2d at 919. Articles described SWAT team searches of the neighborhood where Daniels was hiding. *Id.* News accounts described the perpetrator as a Black paraplegic, and Daniels was identified in press accounts as the killer from the very beginning. *Id.*

Although the publicity diminished after Daniels's arrest, it resumed as trial approached. Three months before the trial, news articles covered the local school board's proposal to rename its football stadium in honor of officer Doty. *Id.* One month before Daniels's trial was to begin, on the anniversary of the killings, a statue commemorating fallen police officers was unveiled by the county. *Id.* The publicity surrounding the memorial and its unveiling ceremony largely referred to officers Trust and Doty. *Id.* The memorial statue, standing nine feet tall, was located across the street from the Riverside County courthouse where Daniels was tried.[30] *Id.*

Based on our review of the California Supreme Court's findings, the public's response to this publicity clearly amounted to a "huge" wave of public passion. As the California Supreme Court described it, police stations were "deluged" with calls from citizens offering tips on the investigation and offering to establish a memorial fund. *Id.* at 920. In addition, local newspapers printed numerous letters from readers calling for Daniels's execution. *Id.* The officers were turned into "posthumous celebrities," and approximately three thousand people attended their funerals. *Id.* That the news coverage saturated the county is reflected in the fact that eighty-seven percent of the jury pool recognized the case from the media

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[30] In closing argument, the prosecution referred to this monument, saying, "The monuments that we build to these people are appropriate, 'Lest we forget.'"

coverage. *Id.* Two-thirds of those empaneled remembered the case from the press accounts-some recalled that the suspect was a Black paraplegic, others recalled that police officers were shot, and two jurors remembered Daniels by name. Id.

The press accounts did not merely relate factual details, but included editorials and letters to the editor calling for Daniels's execution. *Id.* at 919-20. In addition, news articles reflected the prosecution's theory of the case by attributing the killings to Daniels's desire to escape justice. *See id.* at 919. Also well-publicized by the press was Daniels's past criminal offenses, including an arrest for shooting at a police officer. *Id.* Such information was highly prejudicial and would not have been admissible at the guilt phase of Daniels's trial. *Id.*

[20] The nature and extent of the pre-trial publicity, paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity warranted a change of venue. The trial court's denial of this motion for change of venue violated Daniels's right to a fair and impartial jury and thus, his right to due process.[31]

B. Overlapping Special Circumstances

Daniels also challenges the jury instructions given in the penalty phase. He argues that the trial court should have instructed the jury not to "double count" the multiple-murder special circumstance as to both murders. Specifically, the jury in Daniels's trial found to be true the special circumstance that Daniels had been convicted of killing more than one individual. *See* Cal. Penal Code § 190.2(a)(3). But the jury double counted by making this finding twice: once for each officer killed. The

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[31] While the same publicity that tainted the penalty phase would also have infected the guilt phase, Daniels does not raise this argument on appeal, limiting our analysis to the penalty phase only.

court neglected to instruct the jury that it could only consider the multiple-murder special circumstance as a single factor in aggravation. Daniels contends that the trial court erred in allowing this double counting, basing his argument on the plurality opinion of the California Supreme Court in *People v. Harris*, 679 P.2d 433 (Cal. 1984).

On Daniels's direct appeal, the California Supreme Court found the jury's finding of two multiple-murder special circumstances erroneous and set the second finding aside. *Daniels*, 802 P.2d at 938. Citing *People v. Harris*, the court held that because one finding of a multiple murder special circumstance was sufficient to establish that Daniels was "convicted of more than one offense of murder," the second such finding was erroneous.[32] *Id.* The jury, therefore, should have considered only one multiple murder circumstance at the penalty phase. *See id.*; *see also Harris*, 679 P.2d at 452 ("Since there must be more than one murder to allege this special circumstance at all, alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty, a result also inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the

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[32] 32In its plurality opinion in *Harris*, the California Supreme Court stated that "[b]ecause the jury is directed to take into account the existence of any special circumstances found to be true, the constitutionally mandated objective of focusing on the particularized circumstances of the crime and the defendant is undercut when the defendant's conduct is artificially inflated by the multiple charging of overlapping special circumstances or multiple special circumstances based on an indivisible course of conduct having one principal criminal purpose." *Harris*, 679 P.2d at 449. Thus, in "those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one." *Id.* at 452.B

individual offender.") (citing *Jurek v. Texas*, 428 U.S. 262, 27374 (1976)). Nevertheless, the California court concluded that any error was harmless.[33] *Id.*

Similarly, the district court found that the jury was instructed to weigh the aggravating and mitigating factors in its deliberations, but not to count and compare aggravating and mitigating factors. Despite this, the district court concluded that this erroneous "double counting" did not result in prejudice warranting reversal. In rejecting Daniels's argument, the court relied on *Williams v. Calderon*, 52 F.3d 1465 (9th Cir. 1995). In *Williams*, the petitioner was convicted under the 1977 death penalty statute, and we conducted a harmless-error analysis based on the structure of that statute, which we concluded was a "nonweighing" statute. *See id.* at 1475-80. By contrast, Daniels was prosecuted under the 1978 version of the California death penalty statute,[34] which the *Williams* court found to be, "undoubtedly," a weighing regime. *Id.* at 1477.[35]35

Although the differences between the two statutes are subtle, they are critically important when addressing the harmlessness question. *See Id.* at 1477. Under both statutes, a jury must find at least one special circumstance to be true for the defendant to become "death-eligible." *See id.* Under the 1977 statute,

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[33] A state court's conclusion that a constitutional error was harmless is reviewed de novo. *Ghent*, 279 F.3d at 1126.

[34] The 1978 death penalty statute went into effect in November 1978. *See Williams*, 52 F.3d at 1471 n.6. The crime that underlies Daniels's conviction occurred on May 13, 1982.

[35] The statement by the *Williams* court was dicta and, therefore, the question of whether the 1978 statute is a weighing statute is still open in this Circuit. *See Morales v. Woodfern*, 336 F.3d 1136, 1147 (9th Cir. 2003) (assuming, without deciding, that 1978 statute instituted a "weighing" regime). Nonetheless, the structure of the 1978 statute, as explained below, strongly indicates that it creates a "weighing" regime.

however, once the jury had made that determination, it had unfettered discretion to impose the death penalty. *Id.* at 1479 (citing *People v. Boyd*, 700 P.2d 782 (Cal. 1985)). The statute simply required the jury to "consider, take into account and be guided by the aggravating and mitigating circumstances" listed in the statute. *Id.* Under the 1977 statute, the "improper label" of an invalid special circumstance would not prejudice the defendant because the jury could still consider the facts underlying the circumstance and because the jury was not instructed on how it must apply the aggravating and mitigating factors. *Id* at 1479-80.

In contrast, the 1978 statute instructs the jury to "weigh" aggravating and mitigating circumstances, and *requires* them to impose the death penalty if they find that the aggravating circumstances outweigh any mitigating factors. *See* Cal. Penal Code § 190.3 ("[T]he trier of fact. . . *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (emphasis added)). Under the 1978 statute, the presence of an invalid aggravating circumstance-such as an invalid multiple murder special circumstance[36]—is no longer simply an *improper label*, but becomes an additional consideration impermissibly pushing the jury towards a death sentence.

Given the differences between the 1977 and 1978 statutes, *Williams* does not control our analysis here. Rather, we find that the "double counting" error was not harmless.[37] As the Supreme

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[36] California Penal Code section 190.3 requires that, in its sentencing decision, the trier of fact consider "the existence of any special circumstances found to be true pursuant to Section 190.1." While the statute does not label the special circumstances "aggravating factors," it is beyond question that they serve that purpose.

[37] Further, the "weighing" nature of the 1978 statute reinforces Daniels's Sixth Amendment penalty phase claims. The fact that the jury was confronted with substantial aggravating circumstances and was then told that

Court has noted, "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992).

[21] When coupled with other penalty phase errors—such as the court's refusal to change venue, its decision to remove Roth as counsel, and its appointment of inexperienced counsel—the court's failure to instruct the jury that it could not double count the multiple-murder special circumstance gave the jury one more improper reason to tip the scales against Daniels. We agree with the district court that the cumulative effect of the these errors "so infected the[proceedings] with unfairness as to make the death sentence invalid." As we pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir. 2001), "[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." *Id.* at 1178 (internal quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)); *see also Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000) (noting that cumulative error applies on habeas review); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir 1984) ("Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.").

CONCLUSION

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it *must* return a death sentence if it found those circumstances to outweigh the mitigating factors illustrates that Daniels's only chance was a strong penalty-phase defense. These facts strengthen Daniels's contention that he was prejudiced by the weak presentation made by defense counsel during the penalty phase that Daniels was not the shooter.

[22] Because Daniels was denied his Sixth Amendment right to counsel at both the guilt and penalty phases of his trial, we **REVERSE** the district court's denial of his petition as to the guilt phase of his trial, and **AFFIRM** as to the penalty phase.

APPENDIX C

[Filed May 23, 2002]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACKSON CHAMBERS DANIELS, JR.	)	CASE No. CV-92-4683 JSL
Petitioner,	)	ORDER ON PETITION FOR WRIT OF HABEAS CORPUS
v.	)	GRANTING RELIEF WITH RESPECT TO DEATH
JEANNE WOODFORD, Warden, California State Prison at San Quentin	)	SENTENCE AND DENYING RELIEF WITH RESPECT TO GUILT PHASE CLAIMS
Respondent.	)	

Petitioner Jackson Chambers Daniels, Jr., has filed a petition for writ of habeas corpus (the "Petition") with this Court challenging (1) his convictions for the first-degree murders of Riverside Police Officers Dennis Doty and Phil Trust and (2) his death sentence. The Court hereby GRANTS the petition with respect to the death sentence because Daniels' Sixth Amendment right to assistance of counsel was violated at the penalty phase and because the cumulative effect of the multiple errors that occurred throughout the proceedings so infected the proceedings with unfairness as to make the death sentence invalid. Although these serious and egregious errors were

committed from the beginning of the case, the court does not believe that they affected the outcome of the guilt phase. Accordingly, the petition is DENIED with respect *to* the guilt phase claims.

I. Background

A. Factual Background

On December 1, 1983, Daniels was convicted of two counts of first-degree murder. The jury also found the special circumstances allegations of (1) multiple murder, (2) that the murders were committed to avoid lawful arrest, and (3) that the victims were police officers engaged in the performance of their duties. Because the jury found at least one special circumstance, Daniels was eligible for the death penalty and was sentenced to death on January 31, 1984.[1]

At trial, evidence was presented showing that in 1980, Daniels committed a bank robbery and was shot while fleeing. As a result of this shooting, Daniels was paralyzed from the waist down and thereafter was confined to a wheelchair. Daniels was convicted of the bank robbery and appealed the conviction. While his appeal was pending, Daniels posted bail and remained at liberty.[2] Daniels' appeal was denied. After he failed

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[1] Under California Penal Code § 190.3, a finding of just one special circumstance renders a defendant who has been convicted of first-degree murder eligible for the death penalty.

[2] During this time, Daniels was arrested by a Riverside police officer who was given false information that a warrant had been issued for Daniels' arrest. As a result of what transpired while in custody, Daniels filed a claim with the City Council of the

to appear at two hearings following this denial, a warrant for his arrest was issued.

The testimony at the trial for the present offenses indicated that Daniels was staying at the home of James Cornish on May 13, 1982, when Riverside Police Officers Dennis Doty and Phil Trust went to the Cornish residence to arrest Daniels. Renee Ross, Daniels' attendant,[3] testified that she let the officers into the Cornish residence at approximately 8:30 a.m. and took them to Daniels' bedroom. Daniels was sitting on the bed dressed only in a shirt. Ross went to a closet to get Daniels some clothes. Ross looked back and saw Daniels take a gun from between his legs. Ross immediately hid in the closet and heard gunshots.

Ross testified that a few minutes later, she came out of the closet and saw Daniels sitting on the floor with his back against the bed; he had been shot in the right hand. Officer Doty was lying on the floor. Daniels picked an unidentified gun up off the floor and with Ross' assistance got into his wheelchair. As they left the house, Ross saw Officer Trust, mortally wounded, kneeling on the floor of a bedroom.

City o Riverside seeking money damages and alleging that he had been assaulted and deprived of medical care. Declarations submitted in support of his federal habeas petition described Daniels' fear of being taken into custody and mistreated again.

[3] Ross, who was nineteen at the time of the murders, met Daniels through her brother, who also was a paraplegic. Ross had experience caring for her brother and needed extra money, so she agreed to assist Daniels. On May 13, 1982, the day of the shootings, Ross had been working for Daniels for only four or five days.

Ross testified that at Daniels' direction, she drove him to Delorse Butler's house. On the way to Butler's house, Daniels told Ross that he had to pay them back for what they did to him. He told her that the police previously had shot him nine times. Daniels also called the police "mother fuckers". When confronted by Butler, Daniels told her, "Yes, I killed them." It was "either them or me." Daniels eventually fled to Ted Smith's house. Smith testified that Daniels told him that, when one of the officers went to get some clothes for him, he "saw his opportunity and took it." Daniels said that he shot one officer, then the other shot the gun out of his hand. Daniels told Smith that he fell to the floor, got the first officer's gun, and shot the other officer.

Ballistics evidence showed that Doty had been shot three times with an unidentified gun. Trust had been shot six times, primarily with Doty's gun. Trust had fired four bullets from his gun. Three were recovered *in* the house and the fourth in Daniels' hand.

B. Procedural Background

Daniels' convictions and sentence were affirmed on direct appeal [4]. Daniels filed a habeas corpus petition in the California Supreme Court, which was denied on July 22, 1992.

Daniels filed a federal habeas corpus petition on October 22, 1992. On April 30, 1993, Daniels filed a motion for an

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[4] People v. Daniels, 52 Cal.3d 815, 277 Cal. Rptr. 815 (1991).

evidentiary hearing. On July 1, 1999, the Court granted an evidentiary hearing on Claim C(3) and C(4), Daniels' claims that his attorneys were ineffective for failing to investigate his mental impairments at the penalty phase and failing to rebut the state's expert.[5] The court held the evidentiary hearing on February 24 and 25, April 10, and November 2, 2000.

II. THE DEATH SENTENCE IS INVALID UNDER THE SIXTH AMENDMENT

The court holds that the that the death penalty imposed on Daniels is invalid because an "irreconcilable conflict" with his trial counsel deprived Daniels of his Sixth Amendment right to counsel,[6] and because he was deprived of his right to effective assistance of counsel.[7]

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[5] A substantial amount of time passed between the filing of Daniels' federal habeas petition and this court's granting of an evidentiary hearing. The court notes that its first review of Daniels' petition led it to conclude that the petition was without merit. Having made that determination, the court directed the capital habeas staff attorneys to produce a draft of the court's denial of the writ. Because of the multiplicity of claims of error in death penalty cases, the denial of a death penalty habeas petition demands considerable time. When the court reviewed the draft, the court realized that Daniels' petition actually appeared to have merit. The court, therefore, granted the evidentiary hearing.

[6] See Schell v. Witek, 218 F.3d 1017, 1025-26 (9th Cir. 2000) (an "irreconcilable conflict" exists when the conflict between the defendant and his attorney has "become so great that it result[s] in a total lack of communication or other significant impediment" that results in turn in an attorney-client relationship that prevents the attorney from being able to provide adequate assistance).

[7] See Strickland v. Washington, 466 U.S. 674, 685, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The court conducts a separate analysis of the two Sixth Amendment claims in order to provide a complete record for appeal. See, e.g., Schell, 218 F.3d at 1028 (remanding and directing the district court, in the interest of judicial economy, to decide both the ineffective assistance of counsel and irreconcilable conflict claims).

Claims of irreconcilable conflicts between counsel and client and claims of ineffective assistance of counsel usually are analyzed separately under the Sixth Amendment. These normally distinct analyses are to some extent combined herein because communications between Daniels and his trial counsel were doomed from the outset of the appointment. From the beginning, trial counsel's representation of Daniels was marked by a lack of trust that resulted in a total failure of communication. Later, it became marked by unreasonable strategic decisions, and finally it became marked by hopelessness and abandonment. Because his trial counsel was never able to cure the total lack of communication, Daniels was denied the right to counsel guaranteed by the Sixth Amendment.

A. Denial of Right to Counsel

1. Overview

It was clear from the outset that the government's case left Daniels without any remotely credible basis for raising a reasonable doubt as to whether he killed the police officers or as to any of the three special circumstances. According to Ross' testimony Daniels drew an "unidentified" gun immediately before the shooting began and picked up an "unidentified" gun immediately afterward. Daniels confessed three times to killing the officers *in* the presence of three different witnesses, and he, himself, was shot by Officer Trust. Both Doty and Trust were police officers engaged in the performance of their duties, the

murders were multiple, and they were committed to avoid a lawful arrest.

In light of the basically incontrovertible evidence establishing guilt and the three special circumstances that would render Daniels eligible for the death penalty, the only reasonable object of Daniels' defense from the beginning was to try to avoid the death penalty. Any defense based on an effort to avoid guilt entirely not only was sure to fail, but it would also make defending against the death penalty more difficult.

No matter how the guilt phase was approached, however, to avoid state's evidence suggested that the officers were killed while performing what should have been the routine task of escorting someone to prison after his bail had terminated. Partly because of the tragic circumstances of their deaths, the officers were regarded as heroes in the Riverside community.

Daniels, on the other hand, had become a pariah in the community. The officer killings had received wide-spread and almost continuous publicity, and Daniels had been identified as the alleged killer from the beginning.[8] No one ever publicly

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[8] See Daniels, 52 Cal.3d at 849. One newspaper article said "Police were deluged with calls giving tips for investigation and offering to contribute to a memorial fund. 'People are really, really upset about it,' said one officer; another described the 'tremendous community response.'" Id. at 849-50. Newspapers printed numerous letters "calling for the execution of the killer." Id. at 850. The media coverage also recounted prior criminal activity by Daniels that was not admissible at the guilt phase of the trial. Id. Due in part to this media coverage, the victims "became posthumous celebrities," as evidenced by the fact that approximately 3,000 people attended the funeral held for Doty and Trust. Id. In addition, approximately one month before the trial began, a nine-foot statue dedicated to fallen police officers was erected across the street from the courthouse where Daniels was tried. "Although the statue

advanced any reason to believe Daniels was not the killer or that he had any reason for the killings other than the simple desire to escape being brought to justice. Moreover, Daniels had a long criminal record of serious offenses, at least one of which involved shooting at a police officer. Even the fact that Daniels was confined to a wheelchair did not make him sympathetic, since the injuries that caused him to be so confined were sustained in a previous attempt to escape from the police.

This was not a case in which there was any likelihood that the jury would resolve any lingering question of Daniels' guilt by refusing to impose the death penalty. It also was not a case in which the jury would be swayed by the defense's effort to show that, when Daniels was not committing crimes or shooting and being shot at by police officers, he was a relatively decent person. In these circumstances, it was a near certainty that, if the defense presented no credible mitigating evidence to seriously alter the thrust of the state's evidence, Daniels would be found guilty of first-degree murder with at least one special circumstance and would be sentenced to death.

Without Daniels' life so clearly at stake, the need to be represented by counsel whom he trusted, in whom he would confide, and with whom he would discuss his situation in a candid and unguarded fashion was of the utmost importance.

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commemorates all such officers, the publicity attending its unveiling referred largely to officers Trust and Doty." Id. The prosecutor, in fact, referred to it in his summation: "The monuments that we build to these people are appropriate, 'Lest we forget.'"

2. Factu[illegible]istory of Representation[9]

Through the proceedings, the counsel with whom Daniels had a relationship of trust and confidence was an attorney named Andrew Roth. Roth was an established, well-regarded Riverside County criminal lawyer. He had been appointed by Riverside County courts to represent Daniels on prior occasions, including Daniels' appeal from his 1980 robbery conviction. As shown by his behavior over the course of the case, and as described by Daniels, Roth had an abiding concern for Daniels' welfare. He accompanied Daniels to his arraignment for the murder charges, and when Daniels express the strong desire to have Roth's continued representation, Roth advised the trial judge that he was available.

The trial judge, however, initially had appointed the Public Defender to represent Daniels. At the arraignment for the murder charges, Daniels made a motion to substitute Roth as his counsel, and the trial judge held an in camera hearing on Daniels' motion. Present at this hearing were Daniels, Roth, and a deputy public defender appearing on behalf of Daniels. Daniels told the trial judge that he had a conflict of interest with the Public Defender's Office, that he had a long history of misunderstandings with lawyers from that office, that he could not communicate with them, and that they could not represent him properly. The conflict to which Daniels referred arose out

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[9] The court provides a detailed account of the history of Daniels' representation in order to ensure a complete record for appellate review

of the Public Defender's Office's handling of Daniels' trial level defense of his 1980 robbery case. While negotiating a plea agreement for Daniels, his public defender was simultaneously negotiating on his own behalf for employment with the District Attorney's office. After executing the plea agreement, his public defender went to work for the District Attorney, and a new public defender was assigned to represent Daniels at sentencing. Neither the new public defender nor the prosecutor advised the judge of a clause in the plea agreement that provided that Daniels was to be released for treatment of the injuries that had rendered him a paraplegic rather than be incarcerated. As a result, Daniels was incarcerated until Roth, who handled Daniels' appeal, was able to have him released on bail pending the outcome of the appeal.

During the in camera hearing on Daniels' motion, the deputy public defender informed the trial judge that Daniels had filed a federal habeas petition claiming that the public defender who represented him in his 1980 robbery case had provided him with ineffective assistance of counsel. The deputy public defender also advised the trial judge that Daniels did not trust the Public Defender's Office and would not cooperate with it, but she declined to declare a conflict at that time because she had yet to determine whether Daniels' federal habeas petition challenging his 1980 robbery conviction was still pending.[10] Because

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[10] Post-trial affidavits revealed that the Public Defender insisted upon declaring

evidence of the robbery would be admissible in the penalty phase of the murder case, the deputy public defender representing Daniels at the penalty phase would be obliged to argue that its office had provided Daniels with ineffective assistance of counsel in connection with the robbery conviction while simultaneously defending the conviction in federal court if the habeas petition was still pending.

In addition, Roth informed the trial judge that he and Daniels had a long-standing and excellent relationship. The trial judge, however, denied without prejudice Daniels' motion to substitute counsel, in spite of Daniels' express desire to be represented by Roth, Roth's availability, and Roth's demonstrated competence and qualification for appointment.

Following the arraignment on the murder charges and the hearing on Daniels' motion to substitute counsel, Deputy Public Defender Robert Keller was formally assigned to represent Daniels. Roth, a friend of Keller's, had urged him to take on the representation, and Roth had convinced Daniels to allow Keller to work on his case. Keller agreed to the assignment, although he believed that there was an "obvious" conflict in his representation of Daniels and asked the Public Defender to withdraw from the case. With Keller as the counsel of record, Roth, who had succeeded in persuading Keller to work on the case by promising to work on it himself on a pro bono basis,

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conflicts himself and refused to declare one in Daniels' case.

took responsibility for communicating with and advising Daniels with respect to any tactical or legal decision. Keller later described Roth as doing "substantially more work" on Daniels' behalf than Keller did during this period.

After working on Daniels' capital case on a pro bono basis, Roth was appointed as co-counsel on October 15, 1982. Approximately one month later, however, the prosecutor moved to have Roth removed from the case, asserting that he intended to call Roth as a witness at trial. The prosecutor claimed that Roth's testimony regarding whether he had advised Daniels that his appeal of his 1980 robbery conviction had been denied and whether he had told Daniels to surrender himself or to appear in court was material to the issues of premeditation, deliberation, and malice aforethought. Roth argued that calling him to testify would violate the attorney-client privilege and that evidence as to those issues was available by other means.[11] Notwithstanding Daniels' expressed willingness to stipulate that Roth had told him that the appeal had been denied and to appear in court on April 21, 1982, his waiver of all conflicts, and his request that Roth remain as co-counsel, the trial judge unnecessarily removed Roth.[12]

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[11] Roth pointed to a declaration that Daniels signed on April 20, 1982, and offered in support of his federal habeas corpus petition challenging his 1980 robbery conviction. In the declaration, Daniels stated that his appeal was denied by the California Supreme Court. This declaration could have been admitted to show Daniels' knowledge in lieu of Roth's testimony.

[12] The trial judge appears to have granted the prosecutor's motion based on findings

For the next three months, the Public Defender was again sole counsel for Daniels. During this period, it did nothing of substance to prepare for trial. In December, 1982, Keller became too ill to continue with the case and was forced to withdraw. Two other deputy public defenders were assigned to replace Keller. Thereafter, on February 1, 1983, fully nine months subsequent to the date of Public Defender's appointment, these two new deputy public defenders submitted a memo to the new Public Defender outlining the conflict and recommending withdrawal. On February 23, 1983, the court allowed the Public Defender's Office to withdraw as Daniels' counsel based on the Public Defender's representation that there was a conflict.[13]

When the Public Defender belatedly declared the conflict, Roth, already having been removed from the case, was not considered as a replacement. Instead, the court appointed as Daniels' trial counsel ("Trial Counsel"), a lawyer who was just starting into private practice in Riverside County as a sole

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that Roth was merely co-counsel and that Roth's testimony would not be privileged. The trial judge also appears to have been concerned that, if Roth was called to testify, his credibility would be placed in issue during the entire trial, which could undermine and even destroy Daniels' defense. The trial judge did not explain, however, why Roth's testimony as to undisputed facts would raise credibility questions and made no effort to learn why the testimony could not be stipulated.

[13] In this representation, the Public Defender's Office refused to disclose the specifics of the conflict. Without probing further, the court acknowledged that Daniels had been claiming that a conflict existed since the time of his arraignment. It was not until June 17, 1983, hearing on Daniels' motion to dismiss the case on the ground that he was denied counsel that Keller testified and revealed more fully the extent of the Public Defender's Office conflict.

practitioner. Trial Counsel was a former Riverside County prosecutor. He had some limited criminal defense experience, but his primary non-prosecutorial experience was in civil litigation. He accepted the Daniels appointment, his first appointment to handle a criminal defense matter, primarily in the hope that it might lead to future appointments.

As a sole practitioner with a new practice, Trial Counsel did not have the kind of legal and administrative resources necessary for the competent defense of a death penalty case. In addition, he had no experience whatsoever in dealing with the penalty phase of a death penalty case. In fact, he had never before even been involved in a death penalty case either as a prosecutor or as a defense counsel. As a result, Trial Counsel had no concept of the kind of pre-trial strategic planning necessary to deal effectively with potential death penalty issues both at the guilt phase of trial and in the limited time between the guilt and penalty phases of trial.

On April 1, 1983, the court acted to add to Trial Counsel's inadequate resources by appointing co-counsel ("Co-Counsel"). Co-Counsel had been practicing law for only two and one-half years. He too was a sole practitioner, and he had never been involved in any kind of homicide case.

Following Co-Counsel's appointment, Trial Counsel (Trial Counsel and Co-Counsel are hereinafter referred to collectively as "Counsel") was left with less than three months in which to do substantially all of the necessary investigatory work and

preparation for the guilt phase of trial. Co-Counsel undertook the task of drafting all pleadings and jury instructions, crafting all legal arguments, and preparing for the penalty phase in consultation with Trial Counsel. Even with Co-Counsel's help, Trial Counsel had neither the experience nor the qualifications to carry out such an undertaking in so short a time, even in the best of circumstances. In these particular circumstances, Counsel's efforts were completely hamstrung by the fact that Daniels viewed Trial Counsel's appointment as further proof that he was being intentionally deprived of fair representation so as to ensure his conviction and death sentence. As a result, Daniels refused to deal with Trial Counsel in any meaningful way. The court need not endorse this view to find that it was not unreasonable in the circumstances.[14] Trial Counsel, himself, understood why Daniels distrusted him, and considered it not unreasonable in the circumstances. Indeed, given the fact that not one substantive ruling was made in Daniels' favor during the entire course of the proceedings, Trial Counsel was so

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[14] Daniels' counsel for his federal habeas petition correctly state that Daniels' long history of prison reports suggesting mental illness and the degree of Daniels' mistrust should have put Trial Counsel on sufficient notice so as to cause him to investigate Daniels' mental health and capacity to assist in his defense. Trial Counsel had been told by one psychiatrist, with whom Daniels had refused to communicate because he so severely mistrusted Counsel, that Daniels appeared to suffer from "paranoid ideation" but did not appear to suffer from a mental impairment to a degree that he could be absolved of responsibility for the shootings or would not be competent to stand trial. Despite this psychiatrist's admitted inability to communicate with Daniels and tentative diagnosis, Trial Counsel failed to pursue any follow up diagnostic examinations. The court notes, however, that it was not unreasonable for even a mentally sound person, given the circumstances, to view the proceedings and selection of counsel with mistrust.

convinced that Daniels was being denied a fair trial that, even before the penalty phase, he began to gear his defense toward a future motion for a new trial rather than toward a favorable result in the case at bar.[15]

Notwithstanding that nothing of substance had been done by Daniels' previous counsel to prepare the case in the nine months before Counsel filed a motion for a continuance, the trial judge denied the motion and retained the original trial date.[16] Trial Counsel again moved for a continuance before the penalty phase began. This motion was also denied. Following this denial, Counsel made a request for funds, including funding for mental health expert testimony. No funds, however, were granted until the trial had concluded and Daniels had been sentenced to death.

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[15] The only difference between Daniels' and Trial Counsel's beliefs was that Daniels believed that Trial Counsel was part of this conspiracy.

[16] In any capital case, three months would be a very short time *in* which to prepare an adequate defense. In this case, because Counsel and client could not communicate at all, the shortness of time completely disabled the defense preparation process. The court's failure to grant the motions for continuances left Trial Counsel with little or no time in which to overcome Daniels' understandable mistrust and to develop a rapport that would enable him to prepare an adequate defense. At the hearing on Counsel's motion to continue, Daniels refused to waive time. Daniels' refusal reflects just how profound the communication failure was--Counsel could not even persuade Daniels of the importance of securing more time so as to adequately prepare.

3. Legal Analysis of Representation

Daniels claims that his Sixth Amendment rights were violated because there was a total lack of communication and a total breakdown of his relationship with his trial counsel.[17]

a. Applicable Law

The Sixth Amendment guarantees assistance of counsel, which is comprised of two correlative rights: "the right to counsel of reasonable competence, and the right to counsels undivided loyalty."[18]

When a criminal defendant claims that his counsel was not competent, or was "ineffective," the claim is analyzed under the standard established by Strickland v. Washinqton.[19] Under this standard, the criminal defendant must show that (l) counsel's actions were "outside" the range of professional conduct (the "performance prong"), and (2) but for counsel's error, there is a reasonable probability that the result of the proceeding would

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[17] Daniels also claims that his Sixth Amendment rights were violated because he had an actual conflict of interest with the Public Defender's Office. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). The California Supreme Court concluded that Daniels had not "shown any personal or professional relationship suggestive of a conflict of interest between the deputies actually representing him in this case and the departed deputy who had represented him in the. . . [1980] robbery trial." Daniels, 52 Cal.3d at 843. Because the court finds that an irreconcilable conflict existed between Daniels and Counsel, and because the court finds that these same lawyers provided ineffective assistance at the penalty phase, the court need not resolve this close question nor base its granting of relief under the Sixth Amendment on this claim.

[18] Frazier v. United States, 18 F.3d 778, 786 (9th Cir. 1994 (Beezer, concurring) (citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988)).

[19] 466 U.S. 668, 104 S.Ct. 2052.

have been different (the "prejudice prong").[20] Part of the performance prong standard is a requirement that counsel and client be able to communicate so as to permit counsel to develop an adequate defense.[21] Although the Sixth Amendment guarantees indigent defendants neither their choice of counsel[22] nor a "meaningful" relationship with counsel,[23] a court must substitute new counsel if the relationship between lawyer and client completely collapses or an irreconcilable conflict develops.[24] Substitution is required because "to compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom he has been embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."[25] When determining if a conflict is "irreconcilable," reviewing courts should consider whether "the conflict between [petitioner] and his attorney had

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[20] Id. at 687. The Ninth Circuit recently clarified that a reasonable probability is less than a preponderance. See Visciiotti v. Woodfield, 2002 WL 663777, *8 (9th Cir. Cal. 2002).

[21] See, e.g., Frazer, 18 F.3d at 782 (the performance prong "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice") (citations omitted); see also Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970).

[22] See Caplin & Drysdale, 491 U.S. 617, 624, 109 S.Ct. 2646, 2652, 105 L.Ed.2d 258 (1989).

[23] See Morris v. Slappy, 461 U.S. 1, 3-4, 103 S.Ct. 1610, 1612-13, 75 L.Ed.2d 610 (1983).

[24] See United States v. Moore, 159 F.3d 1154, 1158 (1998); Schell, 218 F.3d at 1023.

[25] Moore, 159 F.3d at 1169 (emphasis added).

become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment."[26]

If the court finds that there was a "serious conflict" that "resulted in the constructive denial of assistance of counsel, no further showing of prejudice is required," and prejudice is presumed.[27]

b. Discussion

The lack of communication between Daniels and his counsel was so profound that it rendered Counsel completely unable to discover the basic information necessary to give fair consideration to how best to defend Daniels at the guilt phase or to develop any meaningful mitigation at the penalty phase.

In the penalty phase, the development of any meaningful mitigation would have to begin from Daniels' account of the relevant events and his explanation as to why they transpired as they did.[28] With even the barest minimum of communication, Trial Counsel could have persuaded Daniels at least to confirm

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[26] Schell, 218 F.3d at 1026.

[27] Id. at 1027 (citing Strickland, 466 U.S. at 692). If, however, the "serious conflict did not rise to the level of a constructive denial of counsel, [the petitioner] would have to prove that he was prejudiced by the conflict." Id. at 1028.

[28] To give such an account would have required Daniels to waive his Fifth Amendment rights, which continued through appeal. In light of the overwhelming independent evidence against him, however, such a waiver would have been an insignificant sacrifice. As discussed infra, the record suggests that Daniels was indeed willing to waive his rights to testify.

and explain his three prior confessions and to address such questions as: What prompted Daniels to act as he did? Did he act entirely on the spur of the particular moment? If he had hoped to escape, why did he not leave during the weeks immediately after he learned that his appeal had been denied and before the officers arrived to return him to custody? When he did draw his gun, did he simply intend to induce the officers to drop their own guns? If so, did he ask the officers to drop their weapons? If not, did he expect the officers to try to draw their guns for the purpose of shooting at him?

In light of the evidence adduced at trial, it is obvious what the answers to these questions would have shown: when the officers entered the residence they had not drawn their weapons. "[Seeing] his opportunity," Daniels acted on the impulse of the moment and drew his previously concealed gun, very likely expecting that surprising the officers in this way would allow him to flee without actually having to use his gun. The officers, however, responded by going for their weapons, thereby producing a situation in which "it was either them or me," and the shooting commenced.

Exactly what Daniels might have said, or how he might have explained his actions, however, is not important. What is critical is that Trial Counsel was unable to get Daniels either to admit that he shot the officers or to provide any explanation whatsoever of the events.

Daniels' mere admission of the inescapable conclusion that he shot the officers, even without explanation but if coupled with an appropriate expression of remorse, would have permitted consideration and development of the standard means by which capital defendants are portrayed to the jury in a more sympathetic light.[29] Given an understanding of what happened and why, Trial Counsel could have used that information to obtain meaningful psychological testimony.[30] Provided with this understanding, a psychologist could have supplied the jury with a better understanding of why Daniels acted as he did--impulsively--given his background, experience, and the stress of the particular moment. Daniels' other witnesses, in turn, could have demonstrated that they continued to support and bear sympathy for Daniels in spite of their knowledge of the details of what he had done.

Instead, facing the same jury that had just convicted him of multiple first degree murder with special circumstances, Daniels was forced into the worst possible posture throughout the penalty phase: that of a defendant who was still unwilling to admit what the overwhelming evidence established, who was

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[29] See e.g., Caro v. Woodford, 280 F.3d 1247, 1257 (9th Cir. 2002) (because the jury has broad latitude to consider "amorphous human factors, to weight the worth of one's life against his culpability[,]" all relevant information must be "unearthed for consideration at the capital sentencing phase").

[30] See id. at 1254-44 (stating that the Ninth Circuit "has held that counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health" and that this duty is "key to developing an effective death penalty presentation").

still unwilling to provide any explanation for what he had done, and who had not expressed any remorse whatsoever.[31]

No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel was violated by reason of a breakdown of communications between client and counsel has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself.[32]

In all of the existing Ninth Circuit cases involving a "breakdown" in communications between counsel and client, the "breakdowns" are attributable, in whole or part, to acts of

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[31] Not surprisingly, when reviewing Daniels' case, the California Supreme Court found no prejudice by reason of other alleged errors made during the sentencing phase in light of the little relative weight advance in mitigation. Daniels, 52 Cal.3d at 889-90.

[32] See. e.g., Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) (where defendant was charged with first-degree murder in connection with the death of his girlfriend following a night of alcohol and drug use and a physical altercation between the two, a dispute arose early in counsel's representation of defendant, causing him to refuse to cooperate or to testify at his trial and resulting in the offering of a perfunctory defense and defendant's conviction for first-degree murder); United States v. Williams, 594 F.2d 1258 (9th Cir. 1979) (defendant and counsel moved for substitution of counsel based on incompatibility as to preparation for robbery trial where identity was at issue, and defendant chose to represent himself rather than proceed to trial with counsel with whom he was "at serious odds"); Frazer v. United States, 18 F.3d 778 (9th Cir. 1994) (irreconcilable conflict existed where counsel had called robbery defendant a "stupid nigger son of a bitch" and had threatened to provide ineffective assistance if defendant insisted on going to trial, causing defendant to agree to a trial on stipulated facts); United States v. Moore, 159 F.3d 1154 (9th Cir. 1998) (irreconcilable conflict began when counsel failed to keep defendant apprised of plea negotiations and continued throughout representation as defendant was dissatisfied with counsel's preparation and failure to present an affirmative defense to drug conspiracy and possession charges); Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (remanding for evidentiary hearing into whether the relationship breakdown rose to the level of an irreconcilable conflict, where the dispute arose between defendant and counsel as to how to combat fingerprint evidence that was the prosecution's only evidence linking the defendant to the burglary he allegedly committed).

counsel during the course of the representation. In this case, communications did not "break down", but rather never existed. Daniels' refusal to communicate was the understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings.

The decisions of the trial judge as to selection and removal of counsel led to Daniels' mistrust and the resulting communication failure. The court does not fault Daniels either for the mistrust or for the communication failure. In addition, while it may not be that the acts of Trial Counsel caused the mistrust and communication failure, Trial Counsel was at fault for the failure to do more to overcome it.[33] If anything, Trial Counsel's failure to overcome his inability to communicate with Daniels was more devastating to his capacity to represent Daniels effectively than in any existing case in which a communication breakdown impeded counsel's capacity to render assistance and in which courts presumed prejudice.[34] Daniels' case represents the paradigm case as to why prejudice

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[33] See discussion infra regarding Trial Counsel's ineffectual efforts to overcome this communication "breakdown".

[34] The courts have presumed prejudice in cases where the conflict between counsel and client resulted in the constructive denial of counsel. See Schell, 218 F.3d at 1026. While the court finds that the conflict here deprived Daniels of any counsel whatsoever, the court nonetheless discusses the harm resulting from the conflict for the purpose of providing a complete record for review, should a reviewing court determine that the conflict did not rise to the level of a constructive denial of counsel and therefore decide to undertake a prejudice analysis. See id. at 1028.

must be presumed. The record indicates that Daniels, at some point, contemplated testifying. Because the record is clear that Trial Counsel never learned Daniels' version of events, Daniels was contemplating testifying without the informed advice of counsel. It is in a case presenting circumstances like these--where the breakdown in communication impeded counsel's ability to provide assistance as to the most basic considerations for a defense--that prejudice must be presumed because it is so likely to have occurred.[35]

Daniels has not shown that there was any other counsel available to be appointed at the time Trial Counsel was selected.[36] For this reason, the court does not conclude that his Sixth Amendment right to counsel was violated during the guilt phase.[37] When Daniels moved to have Trial Counsel replaced for the penalty phase, however, qualified counsel was undeniably available. Because the "conflict" for which Roth had been disqualified had been eliminated by his testimony during

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[35] See, e.g., United States v. Cronic, 466 U.S. 648, 658-60, 104 S.Ct. 2039, 2046-48, 80 L.Ed.2d 657 (1984).

[36] The court had requested that the record be supplemented with evidence as to whether the trial judge had before it any other possible appointments. No such information was ever provided.

[37] Compare Mayfield v. Woodford, 270 F.3d 915, 925-26 (9th Cir. 2001) (holding that district court did not err in denying a habeas claim for ineffective assistance of counsel at the guilt phase, explaining that "[i]n light of the strong inculpatory evidence presented by the State at trial, we find it unlikely that a competent performance by [defense counsel] would have altered the jury's verdict. . . . By the conclusion of the State's case-in-chief, there can have been no reasonable doubt in the jurors' minds that [the defendant] was guilty of two first degree murders. This may well have been one of those cases that was virtually indefensible.").

the guilt phase of trial, there was no longer a valid impediment to his appointment. The decision not to substitute alternative, available counsel[38] for the penalty phase was erroneous and denied Daniels the "effective assistance of any counsel whatsoever."[39]

B. Ineffective Assistance of Counsel at the Penalty Phase

Daniels' claim of ineffective assistance of counsel succeeds because the court is "unable to conclude with confidence that, absent counsel's errors, [Daniels] would have been sentenced to death."[40]

1. Applicable Law

In ineffective assistance of counsel cases, the Strickland benchmark is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result".[41] As discussed herein under the Denial of Right to Counsel, supra, the Strickland standard has two prongs: the performance prong and the prejudice prong.[42] The performance prong in the penalty phase of a capital case requires that counsel "conduct sufficient

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[38] The trial judge's error in failing to substitute available counsel at the penalty phase cannot be fairly characterized as a "choice of counsel" question. The court, therefore, does not address it as such.

[39] Schell, 218 F.3d at 1026-27.

[40] Strickland, 466 U.S. at 695.

[41] Id. at 686-87.

[42] See id.

investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'"[43] The Ninth Circuit has interpreted the prejudice prong of this standard as requiring that "[e]ven in the face of . . . strong aggravating evidence, [the reviewing court] must reverse [the defendant's] death sentence if [it] cannot conclude with confidence that the jury would unanimously have sentenced [the defendant] to death if [defense counsel] had presented and explained all of the available mitigating evidence."[44]

2. Discussion

a. Performance

Strickland requires sufficient communication between counsel and client to enable counsel to develop an adequate defense.[45] Without reference to whether the failure of communication between Daniels and Counsel, in and of itself, represented a constructive denial of Daniels' right to counsel, Counsel's ineffectual efforts to communicate constituted ineffective assistance.[46] Because Trial counsel was unable to

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[43] Mayfield, 270 F.3d at 927 (quoting Williams v. Taylor, 529 U.S. 362, 393, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

[44] Id. at 929 (citing Williams, 529 U.S. at 368-69).

[45] See Frazer, 18 F.3d at 782.

[46] See Williams, 529 U.S. at 393 (stating that in the sentencing phase of his capital trial, the defendant had a "constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer").

overcome the communication impediments, Trial Counsel made multiple mistakes: he failed to learn the content of Daniels' testimony and advise him as to how to offer it, he undertook an inadequate investigation into Daniels' background and mental health, and he employed an ill-prepared, incompetent psychologist whose testimony aggravated rather than mitigated.[47]

Perhaps the key element of Daniels' potential defense at the penalty phase was what a competent psychologist might have been able to say both to explain Daniels' conduct and to provide a context that would make meaningful statements of the dozens of witnesses who described Daniels as a non-violent man who had adjusted to his shooting by police officers and the resulting paraplegia without anger.[48] Any such psychological testimony would have to have been grounded in Daniels' testimony, or at least in knowledge of what the content of Daniels' testimony would have been. At the evidentiary hearing before this court, Trial Counsel acknowledged that he understood how critical Daniels' testimony was: he recognized that the only valid defense strategy was to call Daniels to testify in his own behalf

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[47] Ainsworth v. Woodford, 268 F.3d 868, 874-75 (9th Cir. 2001) ("counsel's ill-preparation resulted in the testimony of one defense witness . . . whose testimony contribut[ed] to the evidence in aggravation" rather than in mitigation).

[48] See Caro, 280 F.3d at 1254-55 (stating that the Ninth Circuit "has held that counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health" and that this duty is "key to developing an effective death penalty presentation").

because he had no credible defense to guilt. Even knowing this, he did not press Daniels to share the content of what his testimony would have been or ultimately to testify.[49] He did talk with Daniels and ask him for his account of the relevant events, but he did not explain that because he had no legitimate defense to the government's case for guilt, without his testimony he would have no real defense to the government's case for the death penalty. He did not explain that without Daniels' testimony, any attempt to defend against guilt at the guilt phase was likely to make his situation at the penalty phase worse. He also did not explain that the extent to which the jury would give mitigating weight to psychological or other evidence offered at the penalty phase would be interdependent with his testimony.[50]

Perhaps most importantly, Trial Counsel failed to make use of Roth to overcome his inability to communicate with Daniels. Following his removal, Roth avoided speaking with Daniels about anything related to this case because he feared that such discussions would not be privileged and could therefore be subject to examination when he was called as a prosecution witness. For the same reason, Trial Counsel claimed that he

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[49] As discussed supra, the record suggests that Daniels, at some point, did contemplate testifying.

[50] See Caro, 280 F.3d at 1257 ("It is significant in considering the impact of the omitted evidence on the reliability of Caro's sentence, that the evidence presented by the defense as mitigation consisted primarily of lay background and character evidence. The only expert testimony presented relating to [defendant's] mental health did not shed light on his brain damage[,]" and instead "tended . . . to paint him as a violent psychopath.").

avoided discussing the case with Roth. Trial Counsel failed to explain, however, why he did not seek information from Roth that might have assisted him in some way in establishing communication with Daniels; indeed, Roth's conveying of information to Trial Counsel would not have posed any risk that Roth would have learned anything he did not already know and about which he could have been subject to questioning as a witness.[51]

Furthermore, Trial Counsel failed to explain why, at the penalty phase, following the elimination of any need for Roth's testimony, he did not make full use of Roth's relationship to overcome the ongoing impediments to his communication with Daniels. When the trial judge denied Daniels' motion to appoint Roth as counsel for the penalty phase, in fact, he suggested that Counsel should seek assistance from Roth.[52] Trial Counsel's

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[51] The primary reason for the court's concern about not also reversing the guilt phase is that the decision to disqualify Roth was clearly erroneous. Moreover, the effect of the designation of Roth as a prosecution witness was to preclude Trial Counsel from using Roth to facilitate communication between Trial Counsel and Daniels, thereby chilling Trial Counsel's ability to effectively represent Daniels. The trial judge's errors did not end with the guilt phase, as discussed supra and infra. When considering Daniels' motion to re-appoint Roth as counsel for the penalty phase, the trial judge, ignoring Co-Counsel's declaration describing the communication void, insisted that Roth need not be appointed: "I don't see any reason why Mr. Daniels can't fully and fairly disclose anything to Mr. Roth. Mr. Roth, I notice, has taken an interest in the trial and he has been in and out of the courtroom throughout the case. . . . I am sure there can be cooperation between Mr. Roth and Mr. Daniels and [Counsel] in this case whether or not Mr. Roth is appointed by the court to represent Mr. Daniels. . . . If Mr. Daniels wants to confide in Mr. Roth and Mr. Roth [will] consult with his present counsel, that certainly can be done."

[52] See citation to record, supra note 51.

testimony at the federal habeas evidentiary hearing suggested that at some point late in his representation of Daniels, he and Co-Counsel came to view any communication between Roth and Daniels as "militating against our position in attempting to defend [Daniels]." Trial Counsel recalled he and/or Co-Counsel warning Roth to "keep [his] hands off and let's see if we can handle this to the best of our ability." In light of Trial Counsel's admitted knowledge that Daniels' testimony was critical to his defense and his ongoing inability to communicate with Daniels, his failure to use Roth in any way to overcome the communication failure, particularly by the time of the penalty phase when any threat from Roth's designation as a witness had been lifted, constituted deficient performance. [53]

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[53] See Caro, 280 F.3d at 1255 (stating that where trial counsel conceded he had no strategic reason for failing to investigate the defendant's exposure to neurotoxicants, he had "failed to adequately justify his reasons for not conducting a reasonable investigation and, therefore, rendered deficient performance"). See also Williams, 529 U.S. at 393. Unable to overcome the communication breakdown, Trial Counsel also failed to reasonably design around it. In the face of Daniels' continued silence, Trial Counsel believed that the one defense strategy available to him was to defend against guilt by attempting to create doubt as to whether Daniels was the person who shot the officers. This strategy, however, was the worst possible strategy given the fact that the evidence that it was Daniels who shot the officers was overwhelming and the fact that without Daniels' version of events, Trial Counsel had nothing on which to base such a defense. This strategy, ridiculous in the face of the overwhelming evidence, conferred no mitigation and instead aggravated--because the jury in a capital case renders both conviction and sentence, by adopting this guilt phase strategy, Daniels was likely to face a jury at the time of sentencing that was angry at his attempts to evade guilt and that was therefore more likely to impose death. Even in the face of his inability to communicate with Daniels, selecting such a strategy was ineffectual and in fact was indefensible. See Silva v. Woodford, 279 F.3d 825, 846 (9th Cir. 2002) ("Certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective.") (citations omitted).

Fathomable in part by reference to his inability to communicate' with Daniels, Trial Counsel's handling of mental health experts was woefully inadequate. Without explanation, Trial Counsel failed to pursue obvious leads to develop competent mental health expert testimony for the penalty phase, which prevented key mitigating evidence from reaching the jury. Trial Counsel, unfortunately, had delayed beginning preparations for the penalty phase until a few weeks before it began; he therefore moved for a continuance, but the trial judge denied the motion. Only one week before the penalty phase commenced, Trial Counsel requested additional funds for mental health expert testimony. Funds were not granted, however, until more than a month after Daniels had been sentenced to death. While the trial judge's decisions in this respect were erroneous and severely prejudiced Daniels' penalty phase defense, Trial Counsel's decision to delay his investigation and preparation for the penalty phase until it was essentially too late to permit the development and therefore introduction of meaningful mitigation is without explanation or justification.

Prior to declaring its conflict, the Public Defender's Office had corresponded with a psychiatrist who had treated Daniels as part of his paraplegia rehabilitation and who had established a working therapeutic relationship with him. Trial Counsel made no effort to obtain the assistance of this psychiatrist. Instead, Trial Counsel sought the assistance of a different psychiatrist.

That psychiatrist, however, was unable to persuade Daniels to speak with him and suggested to Counsel that he suffered from "paranoid ideation". Trial Counsel never followed up on this psychiatrist's tentative diagnosis.

Trial Counsel did obtain yet another psychologist to provide "impressions" of Daniels rather than a diagnosis or psychological explanation of his behavior in connection with the shootings. This psychologist, unfortunately, lacked the necessary credentials to testify in a death penalty case. Not only was he not a forensic psychologist, but his only experience as an expert witness was providing evaluations of children for child custody cases. Reflecting his lack of forensic expertise, the defense psychologist limited his interview of Daniels to obtaining his history up through the 1980 robbery because "we had to set some priorities. And I decided not to discuss this case with him. . . ." In addition, the defense psychologist limited his evaluation to the administration of a few preliminary screening tests. When the results of one such test suggested the presence of organic brain damage, the defense psychologist attempted but failed to obtain the assistance of neuropsychology experts to conduct further evaluations. Nor did Trial counsel seek further evaluations.[54] This failure was unreasonable, as demonstrated

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[54] Caro, 280 F.3d at 1255. As mentioned supra, Trial Counsel also failed to follow up on his first psychiatrist's tentative diagnosis that Daniels had paranoid ideations. One of the psychiatrists obtained by Daniels' habeas counsel, in fact, diagnosed Daniels as suffering from a paranoid disorder, explained the relationship between such a disorder and Daniels' family and social history–including the history of mental

by the reports of more extensive evaluations conducted by a qualified neuropsychiatrists in connection with Daniels' state and federal habeas petitions, which suggested the existence of organic brain damage and explained its relationship to Daniels' behavior.[55]

Having learned that the defense psychologist, informed only by the results of preliminary tests and an interview that did not even touch on the events of the present offense, would have nothing of substance to which to testify, Trial Counsel claimed that he explained to Daniels that the defense psychologist's testimony would be "weak," but, he claimed, Daniels had "insisted" that the defense psychologist be called as a witness. Trial Counsel, unfortunately, acquiesced. As a result of the foregoing errors, Daniels never received an examination and conclusive diagnosis by a competent mental health expert, and the jury therefore never heard any mitigating psychological

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illness in his family, and described how such a disorder could affect his behavior. Trial Counsel also failed to investigate the extent to which Daniels' extensive prescription drug regimen impacted his state of mind at the time of the shootings. Nor did Trial Counsel investigate Daniels' history of cocaine and PCP abuse, whether he had been using any illegal substances at the time of the shootings, or whether such past or present use could have had a negative synergistic effect on Daniels' mental health. As a result of these failures, the jury never heard any of this information.

[55] Dr. Rosenthal, one of the neuropsychiatrists who examined Daniels in connection with his state and federal habeas petitions, suggested that further medical tests should be conducted to confirm his finding of organic brain damage. He also explained that this brain damage, which was likely caused by repeated trauma to Daniels' head and the loss of blood and consciousness following the shooting that rendered him a paraplegic, can cause personality changes--impulsivity, poor judgment, a tendency to become violent. Dr. Rosenthal stated that information regarding the presence of brain damage and conclusions regarding its effects was available at the time Daniels was tried.

explanation of Daniels' behavior. Perhaps most damaging, during direct examination, the defense psychologist introduced the word "sociopath" and opined on whether it applied to Daniels. In addition, during cross examination, the prosecutor's questioning emphasized the defense psychologist's lack of expertise, and more troubling, revealed his total lack of preparation--as seen by his admission that he failed to review all of the background psychological materials provided to him by Trial Counsel.

Not only was the testimony of the defense psychologist so disastrous that Daniels felt too "discouraged" to testify after it, but it also opened the door for the state's expert to testify in rebuttal. The state's expert was everything that the defense psychologist was not. He was a nationally certified psychologist and an experienced, forensically trained, expert witness, whose credentials were vastly superior to those of the defense psychologist. He severely discredited the defense psychologist's testimony by attacking the validity of one of the tests that formed the basis of his opinion. The state's expert went on to state that based upon the information relied upon by the defense psychologist, his own conclusion would be that Daniels indeed was a sociopath, and he provided the definition of sociopath as a "man without a conscience."[56] As a result, the final impression

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[56] In connection with the evidentiary hearing on Daniels' federal habeas petition, the court appointed its own expert psychologist, who testified that the information available to the psychologists who testified at the penalty

the jury had of Daniels was that he was a violent, incurable sociopath whose attorneys were so desperate that they had to present the testimony of an unqualified and incompetent psychologist.[57] Even before this time, by his own statement, Trial Counsel had given up any hope of obtaining any favorable result in this case and instead was pinning his hopes for Daniels' defense on a motion for a new trial or on an appeal.[58] Trial Counsel later explained that for those reasons and because he wanted to avoid a "battle of experts," he did not attempt to present any rebuttal to the state's expert.[59] Although

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phase was inadequate and that no reliable diagnosis could be made based on that information alone.

[57] See Ainsworth, 268 F.3d at 874-75 ("counsel's ill-preparation [for the penalty phase] resulted in the testimony of one defense witness . . . [whose testimony] contribut[ed] to the evidence in aggravation[,]" rather than in mitigation).

[58] Trial Counsel's belief in Daniels' chances on appeal was supported by the California Supreme Court's affirmance rate of death penalty cases around the time of Daniels' trial. From 1979 through 1986, the California Supreme Court affirmed only 7.8 percent of the death penalty cases it reviewed. UELMAN, GERALD F., Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts, 23 LOY. L.A. L. REV. 237, 237-38 (1989); KESSLER, C . ELLIOT, Death and Harmlessness : Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases – a Comparison and Critique, 26 U.S.F. L. REV. 41, 43 (1991). By the time Daniels' direct appeal was being considered by the California Supreme Court, however, the composition of the court had changed and the affirmance rate of death penalty cases climbed to 71.8 percent in the years 1986 to 1989 and to 94.2 percent in the years 1990 to 1992. See UELMAN supra. Daniels' direct appeal was denied in 1991.

[59] As the court's appointed expert testified at the federal habeas evidentiary hearing, because both psychologists had relied on insufficient information, they could not offer valid scientific conclusions. Their conclusions were not

understandable, Trial Counsel's decision to essentially abandon any defense was not reasonable.

b. Prejudice

In the penalty phase of a death penalty case in the Ninth circuit, "all relevant information [must] be unearthed for consideration . . . because [t]he determination to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors."[60] Although it cannot be said precisely what the content of Daniels' testimony might have been, Counsel's failure to "unearth" it, so as to be able to evaluate it and provide advice as to how Daniels should offer it, along with Counsel's deficient handling of mental health evidence at the penalty phase, undermine the court's confidence in the outcome.[61] The court concludes that the content of Daniels' testimony, and the manner in which other mitigating testimony might have been

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"expert" opinions, and therefore there was no real "battle of experts". The court's appointed expert explained that instead there had been a battle of forensics. The defense psychologists's lack of credentials and the state's expert's superior forensic training and experience ensured he would win such a battle.

[60] Caro, 280 F.3d at 1257 (citations omitted).

[61] See Strickland, 466 U.S. at 694. See also Silva, 279 F.3d at 834 (stating that the Ninth Circuit has held that cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel) (citations omitted).

tailored to it, could have been such that the jury would not have imposed a death sentence.[62]

III. THE DEATH SENTENCE VIOLATES DANIELS' DUE PROCESS RIGHTS

It is axiomatic that a judicial process that violates other constitutional rights of a defendant does not afford "due" process of law. Even if, however, the manner in which Daniels was provided counsel in this case could somehow survive analysis under the Sixth Amendment, the question would be close enough that the same result would be compelled because the cumulative effect of the multiple other errors that occurred throughout the proceedings so infected them with unfairness as to make the death sentence invalid.[63]

A. Denial of Motion to Change Venue (Penalty Phase)

The process by which the proceedings in this case deprived Daniels of his right to due process of law in connection with his sentencing began with the trial judge's refusal to move his trial to another venue despite the extensive pre-trial publicity surrounding the case and the fact that the jurors passed by a

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[62] See Strickland, 466 U.S. at 694. See also Caro, 280 F.3d at 1257 ("It is significant in considering the impact of the omitted evidence on the reliability of Caro's sentence, that the evidence presented by the defense as mitigation consisted primarily of lay background and character evidence. The only expert testimony presented relating to [defendant's] mental health did not shed light on his brain damage[,]" and instead "tended . . . to paint him as a violent psychopath.").

[63] See Thomas v. Hubbard, 273 F.3d 1164, 1181 (9th Cir. 2001).

statue commemorating slain officers as they entered the courthouse everyday during the trial.[64]

1. **Applicable Law**

A criminal defendant has a right; to be tried by a panel of impartial, indifferent jurors. "Accordingly, a trial judge must grant a motion for change of venue if prejudicial pretrial publicity makes it impossible to seat an impartial jury.[65] This court must conduct an independent review of the exhibits containing news reports about the case to "'determine whether there was such a degree of prejudice against [Daniels] that a fair trial was impossible.[66] Prejudice is presumed as a result of pervasive publicity "when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about; the crime."[67] Among the factors to be considered for presumed prejudice is whether there was a "barrage of inflammatory publicity immediately prior to trial amounting to a huge . . .

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[64] See discussion of the pre-trial publicity supra note 8.

[65] Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir.), amended, 152 F.3d 1223 (9th Cir. 1998) (internal quotation omitted).

[66] Harris v. Pulley, 885 F.2d 1354, 1360 (9th Cir. 1988) (quoting Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984)).

[67] Ainsworth, 138 F.3d at 795 (internal quotation omitted). To determine whether actual prejudice existed, the court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside." Harris, 885 F.2d at 1363.

wave of passion.[68] The court should also consider whether the media accounts were primarily factual[69] and whether they contained inflammatory, prejudicial information that was not admissible at trial.[70]

2. Discussion[71]

Ample evidence exists that the media reports were not limited to factual accounts of the crimes and that Riverside County "was saturated with prejudicial and inflammatory media publicity about the crime."[72] As indicated by the editorials and the commemorative statue, it also appears that there was a "huge . . . wave of public passion" regarding the case.[73] The nature and extent of the pre-trial publicity in this case, coupled with the fact that the overwhelming majority of prospective and

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[68] Patton v. Yount, 467 U.S. 1025, 1033, 104 S.Ct. 2885, 2889, 82 L.Ed.2d 847 (1984) (internal quotation omitted).

[69] 69 See Harris, 885 F.2d at 1362.

[70] 70 See Sheppard v. Maxwell, 384 U.S. 333, 360-61, 86 S.Ct. 1507, 1521, 16 L.Ed.2d 600 (1966).

[71] 71 The court was unable to make an independent review of the pre-trial publicity in this case because the news coverage was not included in the record before the court. Instead, the court relies on the findings made by the California Supreme Court regarding the publicity. See 28 U.S.C. § 2254 (d)(1); Sumner v. Mata, 449 U.S. 539, 546, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981) (an appellate court can make a finding of fact). While deferring to the state court findings of fact, the district court is entitled to give different legal weight to the findings. See Evans v. Lewis, 855 F.2d 631, 633 9th Cir. 1988).

[72] Ainsworth, 138 F.3d at 795.

[73] Patton, 467 U.S. at 1033

actual jurors recalled actual exposure to such publicity, incline the court to grant the petition on this claim alone, but it need not do so because when considered with other errors, the cumulative effect requires that Daniels' sentence be reversed.

B. Erroneous Jury Instruction

The foregoing errors were compounded by the erroneous jury instruction given by the trial court, which allowed the jury to consider overlapping special circumstances at the penalty phase. During the guilt phase of the trial, the jury found true six special circumstances: two of multiple murder, two of murder to avoid lawful arrest, and two of murder of a police officer. In determining whether to impose the death penalty, the jury w a s instructed that it could consider the special circumstances in aggravation.

On direct appeal, the California Supreme Court held that the second multiple-murder special circumstance was erroneous and set it aside.[74] Accordingly, the jury should have considered only one multiple murder special circumstance at the penalty phase. Daniels argues that the jury's consideration of the invalid special circumstance "skewed the penalty phase weighing process in favor of aggravation and injected an impermissible element of unreliability into the jury's capital sentencing determination." The Ninth Circuit rejected a similar claim in

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[74] Daniels, 52 Cal.3d at 876.

Williams v. Calderon,[75] when it held that "it is highly unlikely that the jury simply counted up the special circumstances charged and based the verdict on such calculation."[76]

In Daniels' case, the jury was instructed to weigh the aggravating and mitigating factors to determine the appropriate penalty. The jury was not instructed to count and compare aggravating and mitigating factors. When considered alone, this claim would not entitle Daniels to relief.[77] In the context of the other penalty phase infirmities, however, this misleading instruction gave the jury one more improper reason to tip the scales against Daniels. It, therefore, contributes to the cumulative error that requires a new penalty phase proceeding.[78]

IV. CONCLUSION AND ORDER

Everyone involved treated this case as if the result was foreordained. The haste of the proceedings and lack of care taken to protect Daniels' constitutional rights reflected this presumption. Such a presumption, however, is not constitutionally permissible. Indeed, if anything, Ninth Circuit law makes clear that in death penalty cases the constitution

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[75] 52 F.3d 1465, 1480 (9th Cir. 1995).

[76] Id.

[77] See id.

[78] Daniels also contends that the two special circumstances of murder to avoid lawful arrest were redundant. Daniels, however, provided no legal authority for this argument, and this court, on federal habeas review, will not rule on an unsettled question of California law.

requires that the rights of an accused must be more scrupulously protected. Because the trial in this case was constitutionally deficient at the penalty phase, Daniels' sentence must be vacated.

Accordingly, the court GRANTS the petition for the reasons stated herein. Daniels' claims that are not stated herein as the bases of the court's decision are DENIED. A writ of habeas corpus, therefore, shall issue VACATING and SETTING ASIDE the sentence of death in the case of People v. Daniels, Case No. CR-19711, unless, within 120 days of the entry of judgment herein, the State of California grants Daniels a new penalty trial. If no re-trial is held, Daniels shall be sentenced to life in prison without the possibility of parole.

IT IS SO ORDERED.

DATED: May 23, 2002

/s/
J. Spencer Letts
United States District Judge

(3)

No. 06-1142

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ROBERT L. AYERS, JR., WARDEN,

Petitioner,

v.

JACKSON CHAMBERS DANIELS, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

After evidence is taken and facts are found by a Federal reviewing court on the nature and extent of a conflict of interest between the accused and his lawyer, and a finding is made that there was an "irreconcilable conflict" that deprived the accused of his Sixth Amendment right to counsel through the trial, is it necessary for the reviewing court also to assess prejudice under the *Strickland v. Washington*, 466 U.S. 674 (1984) test?

RESPONDENT'S FORMULATION OF THE QUESTIONS PRESENTED

1. When a criminal defendant refuses to cooperate with his counsel due to his subjective mistrust of them, (a) is he constructively denied his right to counsel? or (b) is counsel ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to overcome that impediment?

2. May defense counsel be found to have provided ineffective representation under *Strickland v. Washington*, based on the failure to investigate and present evidence regarding a defendant's mental health when trial counsel rely on the opinions of two mental health experts that the defendant does not suffer from mental illness?

3. When a state trial court denies a criminal defendant's change of venue motion, may a court of review presume prejudice based solely on pre-trial publicity and without regard to jurors' statements of impartiality during voir dire?

RESPONDENT'S FORMULATION OF THE QUESTIONS PRESENTED – Continued

4. After *Brown v. Sanders*, 546 U.S. 212 (2006), can it be constitutional error for a California court to fail to instruct a capital sentencing jury, *sua sponte*, not to double count redundant multiple-murder "special circumstance" factors where the jury could consider the same underlying evidence as aggravating?

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 428 F.3d 1181. The order denying rehearing *en banc* was not reported. The order and judgment of the United States District Court for the Southern District of California granting relief with respect to death sentence and denying relief with respect to guilt phase claims is unreported. Petitioner has appended both the opinion of the Court of Appeals and the order of the District Court in his Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 2005. The order denying Petitioner Ayers' petition for rehearing *en banc* was filed on November 17, 2006.[1] The jurisdiction of the Court has been invoked under 28 U.S.C. §1254(1).

INTRODUCTION

After an evidentiary hearing during which it heard from his Lead Trial Counsel, and reviewed numerous exhibits, including files, records, and correspondence from Respondent Daniels concerning his lack of trust in trial counsel, that had never previously been reviewed in an

[1] The petition erroneously indicates that the District Court denied the petition for writ, and that it was Respondent Daniels who filed a petition for rehearing *en banc*. As noted here, the District Court granted part of the petition, and it was Petitioner Ayers who sought rehearing *en banc*.

evidentiary hearing in the State courts (none was ever held), the District Court found persuasive evidence of a breakdown in communication between Respondent and his trial counsel. Comparing the facts of Respondent's case to those reported in other Ninth Circuit decisions, the District Court concluded that no other reported Ninth Circuit case had involved a more clear showing that the breakdown in the attorney-client relationship amounted to a constructive denial of the right to counsel than the one in *this* case. (Petitioner's Appendix C at p. 77a, order on petition for writ.)

The District Court examined the effect of the breakdown in communication under the standards pertinent to conflicts of interest between counsel and a criminal defendant, and under those applicable to a claim of ineffective assistance of counsel. Noting that prejudice did not likely need to be determined under the circumstances, nonetheless the District Court engaged in meticulous fact-finding concerning the prejudice to Respondent from the breakdown in his relationship with his lawyers. It also reviewed the facts demonstrating trial counsels' ineffective investigation and preparation of their defense and noted the short period of time they had to prepare Respondent's capital case for trial. It granted relief. That relief, at the District Court level, was limited to reversal of the penalty, on the basis that the infection of the case by the irreconcilable conflict, and counsel's ineffectiveness, affected the penalty phase more than the guilt trial. Both parties appealed the District Court's decision, and Petitioner raised the same contentions in the Ninth Circuit as he had before the District Court, and as he does now.

On appeal, the Ninth Circuit reviewed in detail the District Court finding that the irreconcilable conflict had

manifested itself prior to the commencement of the guilt phase, and had been brought to the attention of the trial court at that time (Petitioner's Appendix B at p. 10a). Finding not only proof of the conflict, and that Respondent's trial lawyers were ineffective in both guilt and penalty preparation and conducted inadequate investigation, it also noted that counsel had only four months (approximately) to prepare their case for trial while litigating motions, and were handicapped by prior counsels' failure to have undertaken any significant guilt and penalty phase preparation. The Ninth Circuit concluded that " . . . [Respondent] proceeded to trial with defense counsel he did not trust and who lacked the time and experience to adequately try a capital murder case." (Petitioner's Appendix B, Ninth Circuit opinion at p. 12a.)

Petitioner attempts to couch the questions presented here as involving misapplication of precedent, and misunderstanding of the law. But the Ninth Circuit's ruling in this case was required by the convincing evidence that there were both Fifth and Sixth Amendment violations as demonstrated below.

Both the District Court and the Ninth Circuit concluded that in addition to the irreconcilable breakdown in the attorney-client relationship, the evidence presented on *habeas corpus* demonstrated that there was ample and obvious evidence uncollected by defense counsel that supported not only a guilt phase defense, but also supplied a compelling theme in mitigation.

Had defense counsel investigated their case, and been able to communicate with their client, they would have uncovered evidence that Respondent, who had a family history of mental illness, had developed an understandable

fear that he would die in custody in the aftermath of being rendered a paraplegic in 1980. There was evidence that he had become despondent and suicidal shortly after having been wounded by police gunfire and severely debilitated in 1980. His mental health, which had previously been questioned, had also deteriorated after 1980. Defense counsel had not prepared a family history, and had not acquired public, medical and legal records relevant to Respondent's case. After having achieved some level of recovery from his grave injuries and entertaining the hope that he might walk again, Respondent was erroneously arrested prior to the advent of the capital case. He was literally dragged on the floor of the Riverside County Jail instead of wheeled around in his wheelchair, and developed a serious infection as a result of the lack of adequate medical treatment. A civil action for damages was brought against Riverside County. Respondent wrote a compelling history of that event, which was relayed to his lawyer at the time, Andrew Roth. But the trial lawyers in the capital case, unable to overcome the breakdown in their relationship with Respondent, never acquired records of the erroneous arrest, and did not make use of attorney Roth (who also represented Respondent during the course of the capital case until he was removed by court order) as a source of information, even though he was known to have a useful relationship of trust with Respondent. The records evidencing Respondent's mental health issues up to his traumatic injury in 1980 and his deterioration after 1980 could have served as the cornerstone of the defense's approach to the case. This was part of what caused the lower courts to grant relief, besides the critical finding that there had been an irreconcilable conflict between Respondent and his trial lawyers.

Finally, Respondent urges the Court to find that Petitioner's questions do not adequately identify the issues decided by the Ninth Circuit and, though Respondent argues that there is no basis for granting *certiorari* here, that the Court should adopt the question presented by the Respondent.

STATEMENT

1. On May 23, 2002 the District Court, Central District of California, granted then Respondent Jackson Chambers Daniels, Jr. *habeas* relief on the issue of penalty, while denying him relief with respect to guilt phase claims. (Petitioner's Appendix C beginning at 56(a).) Prior to that ruling, the District Court held an evidentiary hearing during which it heard from (among others) Petitioner's Lead Counsel at trial, Carl Jordan, and Dr. John Stahlberg, a psychiatrist that the District Court had appointed as its own expert to review the medical and mental health evidence. The District Court also reviewed hundreds of pages of documents submitted by the parties as part of the evidence, including previously unexamined portions of trial counsel's files, medical reports, documents bearing on Respondent's background and history, a thorough psychiatric examination of Respondent, and a number of witness statements. It also reviewed letters written by Respondent to Riverside, California, attorney Andrew Roth after the appointment of trial counsel evidencing Respondent's mistrust of his trial counsel, and his belief that his trial lawyers were discussing what he said with the prosecution. This mistrust was confirmed by the defense's investigator and Respondent's girlfriend at the time. Respondent was described as being convinced that

his trial counsel were cooperating with the prosecution to see him convicted and sentenced to death.

2(a). As a result of its lengthy review process the District Court concluded that there was an "irreconcilable conflict" between Respondent and trial counsel. This conflict had been brought to the attention of the trial court. That court made cursory inquiry and took no curative steps. Respondent was sentenced to death in the California trial court. The state courts granted no *habeas corpus* hearings. The District Court concluded that Respondent had in effect been denied counsel, though it applied to the issue the *Strickland v. Washington*, 466 U.S. 668 (1984) prejudice standard and conducted a prejudice review of the facts. It did so notwithstanding rulings from this Court that denial of counsel is a structural error that does not require a prejudice-intensive inquiry. *Perry v. Leeke*, 488 U.S. 272, 278-279 (1989); *U.S. v. Cronic*, 466 U.S. 648, 659, n.25 (1984).

(b) Based on its review of the facts, the District Court concluded that:

> No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel is violated by reason of a breakdown of communications between client and counsel has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself [footnote omitted]. [Petitioner's Appendix C, District Court opinion at p. 77a.]

3. The Ninth Circuit Court of Appeal reviewed the record, and reiterated many of the District Court's factual findings. Based on the facts demonstrating a lack of communication, and serious conflict, the Ninth Circuit

applied a presumption of prejudice, but nonetheless, undertook a detailed review of the prejudice resulting from the conflict. (Petitioner's Appendix B at p. 27a-47a.) It found that the irreconcilable conflict infected all of the trial proceedings, and that there were Sixth Amendment violations both at the guilt and penalty phase trials.

4. During proceedings below, Petitioner repeatedly attempted to characterize the legal basis for relief as involving a misapplication and misunderstanding of *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983). He does so again here. (Petition at pp. 9-10.) He also seeks to describe this case as one that involves an indigent defendant's unwillingness to communicate with his trial counsel in the aftermath of a trial court's failure to reappoint his 'favorite lawyer' at public expense. (Petition at p. 13.) However, the facts found by the District Court, and discussed in detail by the Ninth Circuit in its decision, demonstrate that there is no basis for Petitioner's complaints about the relief afforded Respondent. Indeed, if there is any complaint here, it is that both the District Court and Court of Appeals found facts supporting a conflict based on a breakdown in attorney-client communication and applied a prejudice based analysis that resulted in reversal of the convictions. Each court should have reversed based on its finding of the constructive denial of counsel. The prejudice inquiry was unnecessary.

5(a). Concerned to demonstrate that there was prejudice that flowed from the irreconcilable conflict, and from defense counsels' ineffectiveness, both the District Court and the Ninth Circuit carefully enumerated those facts that demonstrated the widespread prejudice to Respondent. As the Ninth Circuit pointed out, not only were trial counsel Jordan and Small unable to discuss the

case, or his social, medical, psychological, legal, and institutional history with their client, but also, in the short time allotted to them, counsel did not complete basic case preparation. After both were appointed, they were left with three or four months before the trial began. They had to investigate the guilt phase defense, and the mitigation and rebuttal of aggravation at the penalty phase, while conducting pre-trial motion litigation. They filed numerous motions, but did not complete the necessary preparation, including the acquisition of basic, and obvious, medical, psychiatric, legal and public (litigation-related) records relevant to Respondent and his background. No case-specific psychiatric or psychological examination was completed (though one was initiated) by trial counsel prior to the commencement of the penalty phase. As the District Court and Ninth Circuit noted, the lack of defense preparation, and reliance on a preliminary screening by a psychologist inexperienced in forensic issues, allowed the State to characterize the defense evidence as unqualified and incompetent. (Petitioner's Appendix B at p. 16a.)

(b) During *habeas corpus* proceedings, the District Court retained its own expert, an experienced forensic psychiatrist, who reported that the foundational information made available to mental health experts for both parties at the time of trial was inadequate. In his view, neither the defense psychologist who testified at trial, nor the prosecution's rebuttal witness, "had sufficient information to make a reliable or informed diagnosis." (Respondent's Appendix B, Ninth Circuit opinion at p. 20a.) Moreover, the District Court's expert agreed with Respondent's experts on *habeas corpus* that the one truncated pretrial psychiatric evaluation initiated by Respondent's trial counsel produced findings that not only described

Respondent's mistrust of counsel, but also suggested a paranoia that should have raised questions about Respondent's competence to stand trial, and also provided the basis for defenses to the guilt phase charges, and mental state mitigation. These findings were not followed up on.

REASON FOR DENYING THE WRIT

Introduction

Petitioner urges this Court to grant the writ because, first, the Ninth Circuit misunderstood this Court's rulings on conflicts of interest between a criminal defendant and his counsel, and second, because the Circuit Court created a test for determining a conflict focused on the accused's 'subjective' views and not the 'objective' facts. Petitioner's arguments reflect neither the factual findings of the District Court, nor the Ninth Circuit's application of precedent to a unique set of facts.

As did the District Court, the Ninth Circuit concluded that a series of events, not the least of which were Respondent's repeated statements to the trial judge that he did not trust his counsel, and Lead Counsel's concurrence during post-conviction litigation that this was the case, provided the factual basis for a finding of an irreconcilable conflict in this case. It was the District Court, and not the Circuit Court, that first found that no case in the Ninth Circuit which had previously provided relief because of a breakdown of communication between client and counsel "... has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself." [Footnote omitted.] (Petitioner's Exhibit C at p. 77a.) Petitioner cannot, and does not, dispute this

finding. Rather, he contends that the Ninth Circuit provided relief based on a misapplication of the law. He is incorrect and his arguments provide no basis for granting review here.

Petitioner also argues that the Ninth Circuit's decision has created a conflict among the Circuits on when defense counsel can rely on defense experts when formulating their strategy. Petitioner suggests that the Ninth Circuit performed some analytical sleight of hand and created a test of ineffectiveness of counsel that is directed instead " . . . at the competence of the expert. . . ." (Petition at p. 17.) Nothing in the Circuit Court's decision supports Petitioner's formulation of the question, or the argument made to support it. Both the Ninth Circuit and District Court found that trial counsel had not followed up on easily available and significant evidence. As the Ninth Circuit noted, trial counsel failed to acquire and thus review Respondent's family and social history, which included a history of mental illness and substance abuse. Counsel had also not obtained the readily available medical, legal, and public records pertinent to Respondent's erroneous pre-capital case incarceration and remedial medical treatment. Nor had they obtained copies of Respondent's 1980 medical records, which, during *habeas corpus* litigation, were characterized as providing evidence that Respondent likely had developed brain damage in 1980, and some significant changes in his psychological outlook, including his increased paranoia. (Petitioner's Appendix B at pp. 17a-20a; also p. 36a.) Moreover, Respondent's prison record, if reviewed in detail, demonstrated that he had been the subject of psychiatric and psychological evaluations in prison prior to the capital

case that indicated mental problems. (Petitioner's Appendix B at p. 36a.)

Respondent's lawyers did not obtain information concerning their client's medication records, which would have demonstrated that he was taking a number of psychoactive medications (by prescription) at the time of the offense, and at the time of trial. The Ninth Circuit characterized the lack of collection and review of materials such as prior incarceration files and medical records as similar to the failure of preparation in *Rompilla v. Beard*, 545 U.S. 374, 382-384 (2005). As the Ninth Circuit pointed out (borrowing language from this Court), it is difficult to understand, especially given that Respondent was then only recently confined to a wheelchair because of a traumatic injury and was known to have a history of incarceration and medication, why these omissions occurred. Unlike counsel in *Rompilla*, admittedly, defense counsel in this case faced the daunting task of trying to prepare their case in a very short period of time.

The Ninth Circuit found evidence that the two mental health experts employed by the defense (one who tried to interview Respondent and wrote a one-page letter-report noting Respondent's concerns and paranoia, and the other who was called in the penalty phase trial) were not supplied with relevant and significant records pertinent to Respondent's medical, psychological, social, legal, and family history. (Petitioner's Appendix B at pp. 37a-39a, and n.28.) While the Ninth Circuit took counsel to task for having presented an inexperienced mental health expert as their only mental health witness at trial, the court emphasized that strategic decision-making, and informed approaches to the case, were not possible given the failure of basic investigation. (Petitioner's Appendix B at p. 39a.)

The Ninth Circuit summarizes six separate categories of omissions by defense counsel that it found significant, including: failure to follow up a preliminary screening examination suggesting that Respondent had a mental disorder; failure to follow up evidence of paranoia; failure to review social and family history; failure to investigate the impact of prescribed medication on Respondent at the time of the shootings; failure to investigate the impact of the combination of prescribed and illegal medications. (Petitioner's Appendix B at p. 19a.)

In addition, counsel failed to acquire, and supply to their expert, important medical records. These were characterized in post-conviction litigation as highly significant because they related to a time in Respondent's life (1980) in which he suffered a traumatic injury which, according to Respondent's principal post-conviction psychiatric expert (Dr. Richard Dudley), resulted in mental deterioration and the advent of a paranoid delusion that was important to an understanding of Respondent's later behavior. (Petitioner's Appendix B at pp. 16a-19a.) The omission at issue was more significant than the one in *Wiggins v. Smith*, 529 U.S. 510 (2003) in which counsel failed to follow up on information in their hands, and relied instead on a preliminary workup of the client as the basis for their decision-making and trial presentations. *Id.* at 522-525. Here, there was a clearly defined traumatic injury that resulted in obvious debilitation, Respondent's paraplegia. The question raised was thus not only what the pertinent records would disclose, but also what an expert would make of the significance of Respondent's medical and psychiatric history.

Petitioner attempts to couch this case as one in which a reviewing court had before it a record in which counsel

obtained thorough mental health evaluations, and well-founded expert opinions that any lawyer would have reasonably relied upon in making decisions. But as the Ninth Circuit pointed out, there was no indication that the expert retained, or the psychiatrist contacted, by trial counsel prior to trial conducted any testing and reviewed available records to buttress their views which were not presented in reports, but rather in brief letters. (Petitioner's Appendix B at p. 38a, n.28.) The one defense expert called in the penalty trial had done some screening testing, but not a full assessment. He had only seen some prior incarceration records. He had no available social, medical, legal, or family history; no medical records from 1980 to 1982; no medication records. The Ninth Circuit found that counsel had no reason to rely on unfounded opinions, and noted that counsel testified that he wanted to acquire more information but "was unable to pursue further mental health evidence because of funding and time limitations." (Petitioner's Appendix B at p. 39a.)

The conflict of interest that infected the attorney-client relationship was not cured by what preparation trial counsel were able to do. Rather, as found by the Ninth Circuit, the conflict of interest and the failure of preparation severely prejudiced Respondent.

A. The Ninth Circuit Correctly Applied the Law on the Implications of an Irreconcilable Conflict Amounting to a Deprivation of Counsel to this Case, and its Addition of a Prejudice-Intensive Analysis Was Clearly Intended to Demonstrate That its Ruling Was Factually and Legally Correct

The basis for relief in this case was a finding of denial of the right to counsel at the guilt and penalty phases based on an irreconcilable conflict of interest. The lower courts also found ineffective assistance in the failure to conduct basic record collection and client specific investigation. Petitioner makes intertwined arguments to urge the Court to grant *certiorari* on the basis that the Ninth Circuit has (in several ways) misinterpreted, or incorrectly applied, the required Sixth Amendment analysis to facts demonstrating an irreconcilable conflict. Petitioner argues that the Ninth Circuit has 'created' a test for determining an irreconcilable conflict " . . . based solely upon the subjective beliefs of the defendant." (Petition at p. 11.) This alarmist argument is neither supported by a plain reading of the Ninth Circuit's ruling (Petitioner's Appendix B), nor by the District Court's ruling as adopted by the Ninth Circuit (Petitioner's Appendix C), nor by the facts of the case. Indeed, Petitioner's statement of the case (Petition beginning at p. 2) omits so much of the relevant history that is a matter of record (and was recited in detail by the Ninth Circuit) that the arguments offered by Petitioner cannot survive scrutiny when applied to the known facts of the case.

The District Court stated succinctly what the facts demonstrated – a statement quoted and relied upon by the Ninth Circuit:

> No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel was violated by reason of a breakdown of communications has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself . . . In this case, communications did not "break down," but rather never existed. Daniels'[s] refusal to communicate was the understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings.

(Petitioner's Appendix B at p. 28a, the Ninth Circuit quoting the District Court.)

The District Court set forth a 'factual history of representation' stating: "The court provides a detailed account of the history of Daniels' representation in order to ensure a complete record for appellate review." (Petitioner's Appendix C at p. 64a, n.9.) The history of Respondent's treatment by the trial court was punctuated by significant developments that essentially doomed trial counsel to their fate of having to prepare the defense of a capital murder case involving the highly publicized killing of two popular Riverside police officers in about four months, with a client who felt that he could not trust them. Here, the Ninth Circuit again quoted the District Court:

> The lack of communication between Daniels and his counsel was so profound that it rendered counsel completely unable to discover the basic information to give consideration to how best to defend Daniels at the guilt phase . . . or to develop any meaningful mitigation at the penalty phase.

(Petitioner's Appendix B at p. 28a, quoting the District Court.)

The trial court was told from the first appearance, which was Respondent's hospital room arraignment, that appointing the Public Defender was likely an error. The court did so nonetheless, though it was informed that Respondent had pending a petition for writ alleging the Public Defender's disloyalty to him and ineffectiveness in a prior case (the bank robbery case that resulted in Respondent's 1980 paraplegia) that would figure as part of both the guilt and penalty trial evidence in the capital case. The disloyalty was found in his representation by a Riverside Deputy Public Defender who was negotiating to join the Riverside District Attorney's office while representing Respondent without having notified his client. The ineffectiveness was a failure to investigate available defenses; encouraging Respondent to plead guilty to all charges in return for the promise that Respondent could continue his treatment and physical rehabilitation; and the failure to enforce the plea bargain when the 'deal' was not honored. Attorney Andrew Roth encountered Respondent lying soiled on a gurney in a courthouse hallway, despondent and suicidal, awaiting premature remand to State prison. Roth told Respondent that he would help. He ensured the plea bargain was enforced, and then prepared a *habeas corpus* petition for Respondent.

During the capital case, the trial court countenanced an arrangement that allowed the Public Defender to stay on as counsel of record, even though a 'private' lawyer outside that office, who had previously represented Respondent and had filed the pending *habeas corpus* action, was communicating with Respondent and planning the defense (Andrew Roth). Roth was eventually appointed by the trial court, but he was removed on motion by the prosecutor shortly thereafter. Then the Deputy Public

Defender handling Respondent's case, who had tried to ensure that Roth stayed on as counsel also had to withdraw – having told the trial court more than once that his office should not have figured in the case due to a conflict of interest.

The Public Defender Office stayed on as counsel for several months, without the case being prepared in any useful way. During post-conviction litigation it was revealed that the head of the Public Defender's Office had instituted a policy prohibiting declarations of conflicts of interest by his deputies because of political pressures aimed at curtailing expenses for appointed conflicts counsel. It was nine months into proceedings when the Public Defender, at the urging of several of his deputies, finally declared a conflict. In the interim, Respondent tried to salvage the appointment of attorney Roth by offering to waive his right to attack any defects in the proceedings if Roth were reappointed. The trial court demurred on grounds that it would not allow an indigent to dictate its procedures, and that Roth was to be called as a prosecution witness. Roth testified briefly to matters easily demonstrated by public records.

Regardless of the propriety of the trial court's rulings in removing attorney Roth, its repeated failures to address the Public Defender's conflict, especially after having been informed that Roth had been playing a key role in developing the defense, paved part of the way for the breakdown in the attorney client relationship that followed.

Having finally accepted the Public Defender's declaration of conflict (Respondent was first arraigned in mid-May, 1982 and the conflict declaration was accepted in February, 1983), the trial court then appointed Respondent a lawyer,

Carl Jordan. Mr. Jordan had been a Riverside prosecutor for many years, worked in a civil firm for a couple of years, and was taking Respondent's case as he was opening his own private practice. He had never handled a capital case as a prosecutor or defense counsel. He had never defended a major felony case. Mr. Jordan then recruited Warren Small, who had been in practice for two or three years and never handled a homicide case, to be his co-counsel.

While Respondent sought to have his trusted counsel Roth reappointed, he spoke with his newly assigned lawyers, Mr. Jordan and Mr. Small, with the understanding that they had been assigned to take over. Based on those discussions, and on his interpretations of his new lawyers' actions, Respondent concluded that he could not trust them, and he complained in writing to his former lawyer Andrew Roth that his Lead Trial Counsel was conveying what he said to the prosecution.

The record before the trial court, District Court, and Ninth Circuit, was that Respondent believed that Carl Jordan had been appointed in order to assure his conviction and to hasten his death sentence. He told his girlfriend and the private investigator working on his defense of his concerns. He explained to attorney Andrew Roth verbally and in writing (in letters that were before the District Court and Ninth Circuit) his distrust of his appointed trial lawyers. He repeatedly expressed the view that his trial lawyers were communicating whatever he told them to the District Attorney. While the letters to Roth were not made part of the record until post-conviction litigation, the California trial court was made aware of the distrust and conflict. Respondent explained on the record within three months of the appointment of his trial counsel that he did not trust Lead Counsel, and

he sent the trial court a letter stating the same thing in greater detail prior to the commencement of the guilt phase case. In doing so, he explained his view that his lawyers were talking to the prosecution outside of his presence, and that they were providing confidential information to the prosecution as part of a conspiracy to kill him. (Petitioner's Appendix B at p. 10a.)

By the end of the guilt phase, trial counsel joined in a pre-penalty phase motion by Respondent that attorney Roth be reappointed to assist in the penalty phase, noting the difficulties in attorney-client communication and Respondent's distrust of his attorneys. This motion was reiterated prior to a hearing on a motion for new trial when Respondent explained that he had not been able to confide in his lawyers.

The Ninth Circuit never concluded that Respondent had the right to choose his counsel. It did conclude, first, that the facts demonstrated the existence of a complete breakdown in the attorney-client relationship, and second, that the trial court had been informed of the problem, but failed to perform its duty to inquire into it. (Petitioner's Appendix B at pp. 28a-29a.) It also quoted the District Court's conclusion that under the circumstances, Respondent's failure to communicate with trial counsel was an "understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings." (Petitioner's Appendix B at p. 28a.) By the time of the appointment of his trial counsel, Respondent had been represented by four different Deputy Public Defenders, only one of whom was assigned to represent him for any length of time (and about whom Respondent made only the generic complaint that their Office had a conflict with

him), and by Andrew Roth, who had been operating as his Lead Counsel on a *pro bono* basis, and later by appointment, and who was removed by the trial court. Respondent's interest in the development of an attorney-client relationship that would lead to an effective preparation of his case was apparently of no concern to the trial court.

Nothing in the Ninth Circuit's analysis and ruling shows any departure from, or disagreement with, this Court's rulings on the limits of an indigent's right to choose counsel or to claim denial of a "meaningful relationship with counsel." *Morris v. Slappy, supra,* 461 U.S. 1, 3-4. (Petition at pp. 7-11.) Petitioner seeks to wrap the concerns here around the notion that the accused cannot frame a claim of inadequate representation based on a refusal to cooperate with counsel. Here, the record is clear that (a) over objection, the trial court initially appointed the Public Defender who had a conflict of interest with Respondent, (b) there was a lawyer (Andrew Roth) who had served as counsel of record with whom Respondent had a relationship of trust who was removed by court Order, (c) Respondent felt he had a factual basis for distrusting his appointed trial counsel who had been a prosecutor in Riverside, (d) trial counsel understood that Respondent distrusted them, (e) the distrust and conflict was brought to the attention of the trial court at a point at which a remedy could have been provided (prior to trial). The Ninth Circuit specifically referenced its understanding that Respondent did not have the right to a 'meaningful' attorney-client relationship. It also acknowledged rulings from this Court, and from the Ninth Circuit, indicating that it is a structural error under the Sixth Amendment for the accused to go through trial without any useful communication with counsel. (Petitioner's

Appendix B at pp. 23a-24a, citing *U.S. v. Cronic, supra*, 466 U.S. 648, 659, n.25.) Moreover, as the Ninth Circuit (and District Court) concluded, the procedural history related to the counsel issues in the case makes it clear that: "Daniels was not simply being obstreperous when he refused to communicate with counsel." (Petitioner's Appendix B at p. 26a.)

In sum, the factual findings of the District Court propelled it to find a Sixth Amendment violation. The Ninth Circuit reviewed the factual findings, and largely agreed with them, though it found that the attorney-client conflict infected both the guilt and penalty phase results.

B. The Ninth Circuit and District Court Correctly Concluded That There Was Prejudicial Ineffective Assistance of Counsel

Both the Ninth Circuit and District Court concluded that there were significant portions of Respondent's medical, family, social, legal, and institutional history that his lawyers did not have in hand. Respondent Jackson Daniels was charged with capital offenses in 1982. Before that, and for several years, he was in prison where (on more than one occasion) he was the subject of psychiatric and psychological evaluation. He was diagnosed as having major mental illness. Prior to the May, 1982 capital charges, during the commission of an armed bank robbery in 1980, Respondent was shot 9 times by police officers. He almost died on the operating table, and his medical records indicated he had lost so much blood that the level of blood loss was described by one of the psychiatrists in post-conviction litigation as likely to have caused brain damage. (Petitioner's Appendix B at pp. 18a-19a.) After this episode, Respondent was rendered a paraplegic, wheelchair bound,

and in need of psychological and physical therapy. He required constant pain medication, and other medications including the periodic administration of anti-depressants. As he was recovering, and undergoing further treatments, he was erroneously arrested and mistreated in the Riverside County Jail, requiring remedial medical care and resulting in an action for damages against the jail.

While trial counsel obtained two letter reports from the Public Defender's files from a psychiatrist who saw Respondent after he was shot in 1980, they had not acquired and reviewed: social, medical, legal, and family history documents that documented a familial history of mental illness; the 1980 hospital records documenting Respondent's level of injury and hypovolemic shock due to blood loss; the 1981 erroneous arrest records and the attendant handwritten narrative and medical reports; all psychological evaluation and treatment records up to the time of the capital case; Respondent's medication records from the time of the capital offense, and through the time of trial. (Petitioner's Appendix B at pp. 36a-37a.)

Because counsel did not have the above information in hand, they could not make informed decisions on trial strategy. Further, they could not fully investigate the available guilt phase defenses or penalty mitigation, and could not obtain fully informed advice from experts. The Ninth Circuit found that the lack of basic investigation and case preparation was ineffective. (Petitioner's Appendix B at pp. 33a-40a.) It did so with reference to this Court's rulings in *Rompilla v. Beard, supra*, 545 U.S. 374, 382-384, and *Wiggins v. Smith, supra*, 539 U.S. at 522-525.

The Ninth Circuit also found that trial counsel neither apprised the trial court of the extent of their communication problem with Respondent, nor sought out his prior lawyer Roth, who had a good relationship with Respondent. (Petitioner's Appendix B at pp. 32a-33a.)

The Ninth Circuit concluded that the omissions had been prejudicial because they deprived counsel of the ability to evaluate, and present, defenses at the guilt phase, and mitigation in the penalty trial. (Petitioner's Appendix B at pp. 43a-47a.)

The evidence that trial counsel had not acquired would have helped them not only explain Respondent's condition after 1980, and at the time of the killings in 1982, but also his condition at the time of his trial. The evidence of his prior psychological diagnoses, combined with evidence of the 1980 injury and deterioration, the need for daily medications and pain management, his profound feelings of hopelessness immediately after the 1980 wounding, the evidence of his erroneous arrest, jail mistreatment, and subsequent need for medical assistance all helped to explain his mental state at the time of the capital offenses and at the time of trial. Respondent's growing paranoia about being targeted by police, and his concerns about being 'railroaded' by the Riverside court system, were part of the available information.

Lead Trial Counsel submitted declarations, and testified, in the *habeas corpus* proceedings that he understood that Respondent's most plausible and fact-based defense (and mitigation) centered on making his actions and state of mind understandable to a jury. But in the absence of communication with his client, and without having acquired evidence that made Respondent's situation in 1982

part of a coherent history, trial counsel proceeded with a defense that required no input from his client – namely the defense (in the guilt phase) that Respondent had no involvement in the offenses. Given the short time to get ready for trial, counsel concentrated their efforts on the guilt phase, and were still preparing the case in mitigation when the penalty trial began.

This led to a penalty trial which was, at best, a presentation of a defense work in progress. While the defense presented some of Respondent's relatives, employers, friends, and its psychologist, it did so in such a way as to prompt devastating cross-examination and rebuttal. Its expert was described as ignorant of the basics of psychological assessment. The prosecutor used the defense's psychological presentation as a platform to inject further evidence in aggravation and counter-expert testimony that there was no support for the claim of mental state mitigation.

Having catalogued defense counsel's omissions, the Ninth Circuit concluded that these reached the guilt phase by depriving counsel of the basis to present what, at that time, were partial defenses that allowed the presentation of mental state evidence bearing on whether the accused deliberated and premeditated, thus allowing conviction on second degree (non-capital) murder. Also, the Circuit Court noted that Respondent could have used California's imperfect self-defense as a means of avoiding first degree murder conviction. (Petitioner's Appendix B at pp. 43a-45a.) At the penalty phase, the omissions to collect important records and information about their client deprived counsel of the ability to demonstrate that they had a reliable basis for their case in mitigation which the court concluded meant that " . . . the jury considering Daniels'

sentence was never exposed to meaningful mitigation evidence that may have meant the difference between a life or death sentence." (Petitioner's Appendix B at p. 47a.)

The Ninth Circuit's finding in that regard was firmly rooted in the factual inquiry, and findings, made by the District Court – the only court which (given that the State courts never granted Petitioner a post-conviction hearing) considered all of the evidence bearing on constitutional violations alleged in post-conviction litigation. The facts warranted the result.

C. The Ninth Circuit's Discussion of the Additional Prejudice Caused by Errors in Decisions on Change of Venue and Redundant Special Circumstance Issues Were Part of the Consideration of Cumulative Error, and Clearly Not the Basis for the Ninth Circuit's Essential Ruling

Petitioner also suggests that this Court grant review to address prejudice that was presumed by the Circuit Court in its analysis of change of venue issues. (Petition beginning at p. 20.) Petitioner omits one matter of key importance to the question of whether the Ninth Circuit's discussion of pre-trial publicity in this case warrants further action by this Court. By its own terms, the Ninth Circuit limited its consideration of the deprivation of the right to jury trial guarantee (related to prejudicial publicity) to the penalty phase of Respondent's case. (Petitioner's Exhibit B, Circuit Opinion at pp. 47a-50a.) Thus, the Ninth Circuit considered the trial court's refusal to change venue because of the extensive pre-trial publicity in assessing cumulative error warranting penalty reversal. (Petitioner's Exhibit B at p. 54a.) Furthermore, the Ninth

Circuit reversed the case because of the irreconcilable conflict, pointing to the cumulative error as adding weight to the necessity for vacating the death sentence.

A similar argument applies to Petitioner's complaint about the Ninth Circuit's analysis of the impact of the trial court's allowing redundant special circumstance findings to distort the weighing process during the course of the penalty decision-making. Petitioner takes the Ninth Circuit to task for its assessment of the structural error caused by the multiplication of the special circumstances. However, as with the discussion of the fair jury and media-related issues, the Ninth Circuit was clear that these entered only into the penalty-related cumulative error analysis. (Petitioner's Appendix B at p. 54a.)

The actual ruling was that "because Daniels was denied his Sixth Amendment right to counsel at both the guilt and penalty phases of his trial . . . ," Respondent should be afforded both guilt and penalty phase relief. (Petitioner's Appendix B at p. 55a.)

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: April 17, 2007

Respectfully submitted,

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No. 06-1142

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, Warden,, *Petitioner,*

v.

JACKSON CHAMBERS DANIELS, , *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ROBERT L. AYERS, Warden,, *Petitioner,*

v.

JACKSON CHAMBERS DANIELS, , *Respondent.*

INTRODUCTION

Petitioner respectfully submits this brief in reply to the Brief for the Respondent in Opposition. Daniels seeks to avoid certiorari by emphasizing the district court's "factual findings" and arguing that the Ninth Circuit's published decision is nothing more than the "application of precedent to a unique set of facts." Resp.'s Opp. at 9. As discussed below, Daniels's efforts to escape review are unavailing. Daniels's attempt to blend the Ninth Circuit's decision together with that of the district court only serves to highlight the flaws and inadequacies in the Ninth Circuit's decision. Contrary to Daniels's suggestions, there are no factual grounds for denying certiorari, and the Ninth Circuit's decision, which that court found worthy of publication, will breed nothing but confusion and uncertainty in future cases unless corrected by this Court.

A. Certiorari Must Be Granted To Resolve The Conflict Created By The Ninth Circuit's Subjective Standard For Finding An Irreconcilable Conflict And Its Presumption Of Prejudice Based On Such A Conflict

The Ninth Circuit found a constructive denial of the right to counsel as a result of Daniels's unilateral refusal to cooperate because of his subjective (and paranoid) evaluation of his counsels's performance and the rulings of the trial court. To make matters worse, the Ninth Circuit presumed prejudice as a result of this "conflict," and also alternatively found that counsel were ineffective in failing to overcome Daniels's mistrust of them. In arguing against granting certiorari to resolve the conflict created by the Ninth Circuit's unprecedented decision, Daniels falls victim to the same reasoning plaguing the Ninth Circuit's decision. He tries to explain why he believed his attorneys were part of a conspiracy to kill him, and justify why he believed his dissatisfaction with the trial court's pre-trial rulings gave him license to refuse to cooperate. (Resp.'s Opp. at 17-19.) Daniels insists that the Ninth Circuit's decision does not run afoul of *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983) (Sixth Amendment does not guarantee a right to a meaningful attorney-client relationship), because, among other reasons, he "felt he had a factual basis for distrusting his appointed trial counsel . . . ." (Resp.'s Opp. at 20.)[1/] But Daniels's efforts to explain his actions fail to address the central problem with the Ninth

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1. Throughout his Opposition, Daniels states that trial counsel had no more than "three or four months before the trial began." *See, e.g.*, Opp. at 8. To the extent Daniels suggests that counsels' preparations for trial were limited to this period, he is mistaken. Carl Jordon was appointed as lead counsel on February 23, 1983. Motions and jury selection began four months later, on June 22, 1983. The jury, however, was not sworn until August 29, 1983; during this time, counsel continued to prepare for trial. Moreover, trial counsel also had the advantage of the ten months of preparation undertaken by the public defender's office before it was relieved.

Ci[illegible]t's decision: there is no basis for finding a conflict of int[illegible]t based on a defendant's subjective evaluation of his attorney's performance. *See United States v. Cronic*, 466 U.S. 648, 657 n. 21 (1984) ("If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance.").

Daniels insists that "The Ninth Circuit never concluded that [he] had the right to choose his counsel." (Resp.'s Opp. at 19.) Perhaps not explicitly. Such a conclusion, however, follows inexorably from the Ninth Circuit's new-found subjective standard. Under the Ninth Circuit's rule, a defendant who mistrusts his attorney will be able to waylay the proceedings until he is given an attorney with whom he is satisfied.

Further, Daniels is unable to marshal any reason, authority, or precedent to support the Ninth Circuit's conclusion that the "conflict" created by his refusal to cooperate obviated the need to show any prejudice. He makes a passing reference in his Statement of the Case to this Court's decisions in *Perry v. Leeke*, 488 U.S. 272, 278-79(1989) and *United States v. Cronic*, 466 U.S. at 659 n. 25. Resp.'s Opp. at 6. However, the general recognition in these cases of the principle that prejudice need not be shown "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding" *United States v. Cronic*, 466 U.S. at 659 n. 25, is far different from the conclusion that prejudice need not be shown where the defendant simply refuses to cooperate with counsel who were present at all times during trial. The Ninth Circuit's deletion of the prejudice requirement is, by itself, sufficient to render this issue worthy of certiorari. *See Plumlee v. Papa*, 465 F.3d 910, 943 (9th Cir. 2006) (Bea, J. dissenting) (noting this Court has not recognized "irreconcilable conflict" doctrine).

Finally, Daniels apparently does not attempt to defend the Ninth Circuit's alternative ruling that trial counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S.

674 (1984), by failing to resolve the "communication conflict" with their client. Pet. App. at 31a-33a. Instead, Daniels maintains the Ninth Circuit correctly found ineffective assistance of counsel based on defense counsels' failure to obtain portions of Daniels's medical, family, social, legal, and institutional history. (Resp.'s Opp. at 14-25.) As discussed below, because defense counsel properly relied on the opinions of two psychiatrists, counsel cannot be faulted for failing to further investigate potential mental defenses.

B. Certiorari Must Be Granted To Resolve The Conflict Among The Circuit Courts Regarding When Defense Counsel May Rely On The Opinions Of Mental Health Experts When Formulating Their Defense Strategy

In the Petition, petitioner urged this Court to grant certiorari to decide the split in the federal circuit courts over when defense counsel may rely on expert mental health opinions when formulating trial strategy. Petitioner noted that decisions by the Fourth and Eighth Circuits had held that an attorney does not render ineffective assistance by failing to "shop around" for a favorable expert opinion and specifically rejected claims that an attorney may not rely on a psychiatric evaluation even where the expert does not administer various psychological tests. The Ninth Circuit created a split with these decisions by finding that defense counsel were not objectively reasonable in relying on the opinions of two psychiatrists, Dr. Oliver and Dr. Phillips, when formulating their defense strategy. (Pet. at 15-17.)

Daniels does not contest that the Ninth Circuit decision creates a split among the circuit courts. Indeed, he does not even mention the cases cited by petitioner holding that an attorney may reasonably rely on a psychiatric evaluation. Instead, Daniels maintains that because trial counsel did not obtain various social, medical, and legal records, they could not make informed decisions on trial strategy. (Resp.'s Opp. at 21-

25.) Daniels puts the cart before the horse. He overlooks that neither of the psychiatrists suggested that additional records, documents, history, or tests were necessary before he could render his opinion. Given the finite amount of time and resources available to counsel, the decision not to waste time pursuing such materials was reasonable based on the evidence available to trial counsel at the time, and the lack of any indication that they should obtain further testing. *See Burger v. Kemp*, 483 U.S. 776, 794 (1987) ("counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment.")

More to the point, in rejecting petitioner's argument that counsel reasonably relied on the opinions of the two psychiatrists, the Ninth Circuit did not assert, as does Daniels now, that counsels' reliance was unreasonable because *counsel* did not have the various records to which Daniels points. Rather, the Ninth Circuit found that counsels' reliance on the experts was unreasonable because counsel should have known the opinions could not be trusted:

> Contrary to the State's suggestion, [lead counsel] had every reason to doubt Oliver's conclusions, as he was aware that Oliver had not been able to examine Daniels because of Daniels's refusal to cooperate. Nothing in Oliver's letter indicates that he evaluated Daniels's medical, social, educational, or criminal records or that he conducted *any* medical or psychological testing to assess Daniels's mental state. Similarly, Phillips's letters contain no evidence that he conducted any testing, evaluation procedures, or structured assessment of Daniels's mental state.

Pet. app. at 38-39, n. 28. The problem with this conclusion, which Daniels does not address, is that it turns trial counsel into an *Über*-psychologist who must know more than the experts he retains. The Fourth and Eighth Circuits have rejected precisely such a requirement for constitutionally-effective assistance under the Sixth Amendment. *See, e.g., Walls v. Bowersox*, 151

F.3d 827, 835 (8th Cir. 1998) ("It was entirely reasonable for counsel to rely on the conclusion of two trained psychiatrists that no additional testing was warranted."); *Six v. Delo*, 94 F.3d 469, 474 (8th Cir. 1996) ("Dr. Daniel's report did not recommend any further examination and we cannot say his findings would suggest to a competent lawyer that further evaluation was necessary."); *Poyner v. Murray*, 964 F.2d 1404, 1418 (4th Cir. 1992) (rejecting assertion that trial counsel were ineffective because mental health experts failed to perform certain tests, court observed claim was directed not to the performance of counsel, but rather to the performance of the experts, and there is no right to effective assistance of experts). Daniels does not challenge the conflict created with these decisions.[2]

Daniels attempts to compare the present case to *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Resp.'s Opp. at 11-12, 22. Neither case is apposite. In *Wiggins*, defense counsel failed to investigate the defendant's life history or family background. This Court found defense counsel did not conduct a reasonable investigation when they failed to expand their investigation beyond a presentence investigation report and department of social services records. While counsel had the defendant evaluated by a psychologist, his opinions did not reveal anything about the defendant's bleak life history. *Wiggins*, 539 U.S. at 523. Consequently, unlike the present case, the expert's opinion did not furnish any reasonable basis for not conducting further investigation. Here, in contrast to *Wiggins*, the opinions of Dr. Oliver and Dr. Phillips related directly to the allegedly deficient

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2. It should be noted that Daniels does not challenge petitioner's assertions regarding the factual inaccuracies of the Ninth Circuit's opinion concerning Dr. Oliver's alleged failure to speak with Daniels, defense counsels' supposed belief that Daniels suffered from mental illness, and defense counsels' failure to follow up on Dr. Banks's preliminary examination – which was not revealed to counsel until after the guilt phase was completed. *See* Pet. at 13-19.

investigation into Daniels's mental illness. Unlike *Wiggins*, the question whether defense counsel could rely on the opinions of these experts when formulating their strategy is thus squarely presented.

For similar reasons, *Rompilla* also does not support Daniels's position. As petitioner previously noted in the petition (Pet. at 19 n. 6), the present case does not involve trial counsel's failure to review materials they knew, or should have known, the prosecution would rely upon as aggravating evidence. While Daniels's trial counsel did not obtain certain hospital records, they had no reason to believe the prosecution would rely upon such documents, nor did they have any reason to believe such records would be useful to the defense case in light of the unqualified opinions of the two experts. This distinction with *Rompilla* is particularly noteworthy given the Ninth Circuit's conclusion that defense counsel's performance was inadequate at both the penalty phase *and* the guilt phase. In his Opposition, Daniels simply parrots the Ninth Circuit's reliance on *Rompilla*, but makes no response to petitioner's arguments.

The question whether defense counsel rendered ineffective assistance in failing to further investigate Daniels's asserted mental illness after they relied on the opinions of two psychiatrists that he lacked any mental illness is directly presented. Certiorari must be granted to decide the conflict among the circuit courts as to whether, in order to provide the minimum level of competence required by the Constitution, counsel must be required to second guess the adequacy of such expert opinions based upon asserted deference in the expert's testing and evaluation procedures.

C. *Certiorari Must Be Granted To Prevent The* Ninth Circuit's Erosion Of This Court's Decisions In *Murphy v. Florida* And *Brown v. Sanders* Concerning Venue And Invalid Sentencing Factors

Daniels effectively concedes that issues three and four, concerning the change of venue and failure to instruct the jury not to double count redundant special circumstances, are both worthy of certiorari. He makes no effort to defend the Ninth Circuit's opinion regarding either issue. Specifically, Daniels does not contest that the standard employed by the Ninth Circuit to determine whether prejudice must be presumed from the failure to grant a change of venue motion is contrary to decisions by this Court in failing to consider the jurors' responses during voir dire. Nor does he dispute that the Ninth Circuit's finding of prejudice based on the trial court's failure to instruct the jury regarding the superfluous multiple murder special circumstance stands to undermine this Court's decision in *Brown v. Sanders*, 546 U.S. 212 (2006). Instead, Daniels asserts that the Ninth Circuit's rulings on both of these issues were only part of its consideration of cumulative error, and not the basis for the Ninth Circuit's "essential ruling." (Resp.'s Opp. at 25-26.)

Daniels evidently misses the point. The Ninth Circuit has thumbed its nose at controlling precedent by this Court. The Ninth Circuit cannot insulate its rulings from review by hiding under the rubric of "cumulative error." The court went out of its way to find a separate violation of due process based on the failure to grant a change of venue. (Pet. app. at 47a-50a.) Similarly, the court found a separate due process violation based on the overlapping special circumstances. (Pet. app. at 50a-54a.) Regardless of whether these asserted errors by themselves would have been sufficient to warrant reversal of all or part of

the judgment in the present case,[3] the point remains that the Ninth Circuit has issued a published decision undermining this Court's established precedent. Certiorari must be granted to correct this disregard for this Court's decisions.

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3. Daniels chides petitioner for not mentioning that the Ninth Circuit's venue ruling applied only to the penalty phase. Resp.'s Opp. at 25. He is simply mistaken. *See* Pet. at 6-7. More importantly, he fails to reveal why he believes the limitation of the holding to the penalty phase is of "key importance." The Ninth Circuit limited its holding only because Daniels did not properly present the venue claim as to the guilt phase; the Ninth Circuit nevertheless observed that "the same publicity that tainted the penalty phase would also have infected the guilt phase. . . ." Pet. App. 50 n. 31. Future courts relying on the Ninth Circuit's aberrant reasoning regarding the presumption of prejudice from pre-trial publicity will presumably not be similarly limited.

CONCLUSION

Accordingly, for the reasons stated above, petitioner respectfully requests that this Court grant certiorari in this case.

Dated: April 25, 2007

Respectfully submitted,

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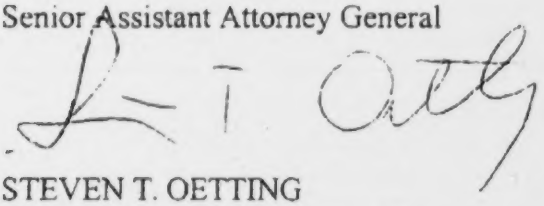

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(2)

No. 06-1142

In The

Supreme Court of the United States

ROBERT L. AYERS, JR., Warden,

Petitioner,

vs.

JACKSON CHAMBERS DANIELS, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CITY OF RIVERSIDE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE CITY OF RIVERSIDE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.4, the City of Riverside, by and through its authorized law officer the City Attorney, hereby submits the following brief in support of Petitioner Robert L. Ayers's Petition for Writ of Certiorari.

As set forth in the petition, this proceeding arises from the Ninth Circuit's reversal of the criminal conviction and death sentence of respondent Jackson Chambers Daniels for the brutal murder of City of Riverside police officers Dennis Doty and Phillip Trust.

The City of Riverside strongly urges the Court to grant the Petition for Writ of Certiorari, reverse the Ninth Circuit judgment, and reinstate the conviction and sentence. For the past 26 years, the friends and families of those slain officers, as well as the community of Riverside itself, have lived without final resolution or closure of this dark episode. The Ninth Circuit's decision now virtually guarantees the reopening of old wounds, and creates the prospect, if not certainty, of at least a decade or more of future litigation. Worse yet, as set forth in the Petition, it does so based upon legal principles that are inconsistent with the decisions of this Court and of the lower federal circuit courts.

The City of Riverside agrees with the arguments presented in the Petition for Certiorari and wholeheartedly adopts them herein. The City emphasizes, however, the particular need for this Court to review the Ninth Circuit's unsupported, and indeed unsupportable, conclusion that a criminal defendant's unilateral decision to

refuse to cooperate with trial counsel based upon the defendant's subjective evaluation of his counsel's performance and the rulings of the trial court, necessarily creates a conflict that results in the constructive denial of counsel. As the Petition correctly observes, the Ninth Circuit's opinion creates a road map for future criminal defendants to follow in an attempt to disrupt and create error at trial, which, in and of itself, would be amply sufficient to warrant the grant of certiorari. But the City of Riverside notes that invocation and application of this highly formalistic, legally untenable rule, which not simply invites, but encourages a cynical manipulation of the judicial system, is particularly odious in the context of this case. Two police officers, while performing their duties and protecting the public, were viciously murdered, resulting in a devastating loss to their families, as well as to the people of the City of Riverside as a whole. If there is any case in which the orderly process of justice is essential, it is in a capital crime involving the slaying of police officers. The City of Riverside therefore respectfully urges the Court to grant the Petition for Writ of Certiorari.

DATED: April 16, 2007

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
City of Riverside
GREGORY P. PRIAMOS